# (25,425)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1916.

# No. 595.

CLARENCE W. TURNER, APPELLANT,

*vs.*

THE UNITED STATES AND CREEK NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1916.

1 I. *Petition and Exhibits.*

In the Court of Claims.

No. 30241.

CLARENCE W. TURNER, Complainant,
vs.
UNITED STATES OF AMERICA AND CREEK NATION OF INDIANS, Defendants.

On August 22, 1908, the claimant filed his original petition.

Subsequently, to-wit: on March 17, 1915, the claimant, by leave of court, filed an amendment to said petition, so that said petition now reads as follows:

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, Clarence W. Turner, respectfully represents:

1. That he is a citizen of the United States, resident in the city of Muskogee, State of Oklahoma, and that he brings this suit in his own right and as surviving partner of the firm of Blackstone & Turner, as assignee of Pussy, Tiger & Co., and as sole party in interest of any and all claims of any of the parties named in this paragraph against the Creek Nation of Indians on account of the grievances hereinafter set forth.

2. That the United States of America is sued as trustee and custodian of the funds in the Treasury of the United States to the credit of the Creek Nation of Indians.

3. That the Creek Nation of Indians is a tribe or nation of Indians situated prior to, at the time of and subsequent to the grievances hereinafter set forth, in what was formerly known as the Indian Territory, and is now a part of the State of Oklahoma; that said Creek Nation of Indians, and the funds of said Nation were and are subject to the authority and jurisdiction and the management and control of the United States of America and subject to the plenary power of the said United States of America; that the affairs of said Creek Nation have been taken in charge by the Government of the United States, under the terms of an agreement between the United States and the said Creek Nation, by an Act of Congress approved March 1, 1901 (31 Stat., p. 861, 1 Kappler, 729), and a supplemental agreement approved by Act of Congress June 30, 1902 (32 Stat., p. 500, 1 Kappler, 761), and are now being wound up and finally settled under the direction of the United States, to the end that the tribal relations and the Government of said Indians of their own affairs be forever dissolved, and that the only funds from which the said Creek Nation are now able, or probably will be able, to satisfy a judgment of this Court, are under the

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control of the United States, in the United States Treasury, and subject to being distributed per capita to the members of said tribe or nation at the discretion of the Congress of the United States, and that the said Creek Nation or tribe of Indians is sued in its own right in the Court of Claims pursuant to jurisdiction and authority conferred by the Act of Congress approved May 29, 1908 (35 Stats., 444—3 Kappler, 370), entitled "An Act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted and for other purposes," Section 26 of said act directing this Honorable Court to render judgment as law and equity may require against said Creek Nation of Indians in favor of Plaintiff for the destruction of personal property and the value of the loss of the pasture of the said Turner, plaintiff, or his assigns, by the action of any of the responsible Creek authorities with their cognizance and acquiescence, the said matter being hereafter more fully set forth.

4. That prior to and at the time of the grievances hereinafter set forth the Creek Nation or Tribe of Indians was a self-governing body having the right and power to enact laws for the government of the territory occupied by the Creek Nation or Tribe of Indians under the terms of treaties between the United States of America and the said Creek Nation or Tribe of Indians. That by Act approved October 6, 1889, providing for the promotion of the public welfare of the people of the Creek Nation or Tribe of Indians and the building and
3 control of pastures in said Nation or Tribe, a law was enacted providing, so far as is material and pertinent to the issues raised in this cause, as follows:

"Be it further enacted, That when extensive pastures, greater in extent than one square mile, can be located on the borders of the Nation to the benefit of any neighborhood, by affording protection against the influx of stock from adjoining nations the same may be located under the following conditions, to-wit:

"The judge of the District shall be notified by any number of citizens of the District of their desire for the establishment of such protective pasture or pastures; he shall then give due notice to the people of the neighborhood of the time and place of a meeting of voters who, when so convened, shall determine by vote or as they shall deem proper, the question whether or not such pastures are needed. If it shall appear that a majority of persons of voting age of the neighborhood thus to be protected favor the establishment of such pastures it shall then be the duty of the judge to let, or grant, only the privilege of holding and grazing stock on such lands to such citizens as may by contract bind themselves to build a substantial fence, of four or more strands of wire; and to pay for such grazing privileges an amount, per acre per year, that shall not be less than five cents. The location of such tract, or tracts of land, as shall be occupied under the provisions of this Act, shall be described in the body of the contract; which contract shall include all provisions necessary to insure and protect the interests of the Nation and the citizens thereof, and shall be in force for the period of three years, with the privilege of renewal.

4 "Be it further enacted, That the judge contracting with the owners of the pastures shall make collection of the tax of five cents per acre per year, as provided under this act, commencing his assessments from the date of the contract, which he shall pay into the National Treasury on the first day of each quarter, beginning respectively with the months of January, April, July and October of each year.

"He shall also render to the National Council a full report of all moneys collected, together with receipts from the National Treasurer; and, if any owner of pastures shall fail to make any quarterly payment, or fail to comply with any of the obligations embraced in the contract with the judge, then he shall forfeit all the franchises granted by the terms of this contract, and the District Judge shall so declare and enforce such forfeiture.

"Be it further enacted, That this Act shall take effect from and after its passage, and the Principal Chief is hereby authorized to furnish printed copies thereof to each District Judge, who shall distribute them to all interested parties.

"Approved October 6, 1889.

L. C. PERRYMAN,
*Principal Chief.*"

The foregoing act or law of the Creek, otherwise known as the Muskogee, Nation or Tribe of Indians was duly and regularly enacted by the lawful authorities of said Creek Nation or Tribe of Indians, and is embodied in the published constitution and laws of the Muskogee Nation, Edition of 1890, on pages 172 to 175, inclusive of said edition.

5 That the Muskogee Nation or Tribe of Indians prior to, at the time of and subsequent to the grievances hereinafter set forth divided the authority of government into three branches, legislative, executive and judicial; that the legislative authority was vested in what was known as the National Council of the Creek or Muskogee Nation or Tribe, the executive authority in a principal chief, national treasurer and certain other officials, and that the judicial authority was reposed and vested in certain judges and in a supreme court.

5. That subsequent to the passage of the act hereinbefore set forth providing for the location and erection of pasture fences greater in extent than one square mile on the borders of the Creek Nation or Tribe in order to provide against the influx of stock from adjoining nations, there was duly and regularly organized the copartnership or firm or voluntary association of Pussy, Tiger & Company. That said firm of Pussy, Tiger & Co. was composed of one Tiger, a leading member of the Creek Nation, one Pussy, likewise a leading member of the Creek Nation, of one Pleasant N. Blackstone, and your petitioner, Clarence W. Turner, then partners, doing business in the Creek Nation under approved license under the firm name and style of Blackstone & Turner, and of ninety-eight other citizens of the Creek Nation or Tribe of Indians, said firm of Pussy, Tiger & Co. being composed in very large part of

citizens of the Creek Nation or Tribe of Indians living on the borders of the Creek Nation or Tribe of Indians and within the district in which was located the pasture fence hereinafter referred to, and was organized in, to-wit, the year 1890, for the expressed pur-
6 pose of taking advantage of the aforesaid pasture fence law and of protecting the borders of the Creek Nation or Tribe of Indians, and of the lands occupied and controlled by the members of the said firm of Pussy, Tiger & Co., and the neighborhood in which said lands were situated against the influx of stock from adjoining Nations or Tribes of Indians. That subsequent to organization of said firm of Pussy, Tiger & Co., notification was duly and lawfully made by and on behalf of a majority of citizens of the district in which the pasture fence hereinafter referred to was located of the desire of a number of citizens of the district in question for the establishment of a protective pasture, to be built along the western border of the Muskogee or Creek Nation or Tribe of Indians, between Deep Fork River an North Fork River in the Deep Fork District, to contain, to-wit, 100,000 acres. That upon receipt of this notification in due and regular form, the judge of the district, otherwise known as the Deep Fork District, the said judge at that time being one Jacob Knight, did, pursuant to the statute hereinbefore recited, give due notice to the people of the neighborhood of the time and place of a meeting of voters to determine under the statute hereinbefore referred to whether or not such a pasture as was proposed was needed. That said meeting was duly held pursuant to law on, to-wit, October 11, 1890, at the court house for the Deep Fork District of the Muskogee Nation, and resulted in a majority of persons of voting age of the neighborhood to be protected casting their votes in favor of the establishment of a pasture on the western border of the Creek Nation in the Deep Fork District, to contain approximately 100,000 acres. A true copy
7 of the records relating to the matter of the said pasture fence meeting of the people of the neighborhood is attached hereto marked "Petitioner's Exhibit A-1," and is prayed to be read as a the same as though incorporated herein.

6. That subsequent to a majority of the persons of voting age of the aforesaid Deep Fork District voting in favor of the establishment of a pasture such as was proposed to be erected by the firm or voluntary association of citizens of the Creek Nation or Tribe of Indians known under the firm name and style of Pussy, Tiger & Co., there was let by the judge of said Deep Fork District, namely, Jacob Knight, to Pussy, Tiger & Co., the privilege of holding and grazing stock on the lands voted to be included within the big pasture hereinbefore referred to, said lands being more particularly described as follows:

"Beginning at a stone on the boundary between the Sac and Fox Creek Nations, two miles more or less southeast of the Sac and Fox Agency, running thence south sixteen miles, thence east twenty-five miles, thence north sixteen miles, thence westerly twenty-five miles to the place of beginning, not less than one hundred thousand acres";

and a contract was duly and regularly entered into between the said Jacob Knight as judge of the Deep Fork District, Muskogee Nation, and Pussy, Tiger & Co., citizens of the Creek Nation, whereby said Pussy, Tiger & Co. bound themselves to build a substantial fence
of four or more strands of wire and to pay for the privilege
8 of grazing stock within said lands the sum of five cents per
acre for each and every acre within the said pasture, said contract fully providing for the protection of the interests of the Creek or Muskogee Nation of Indians and of its citizens, and being for the term of three years, said contract being duly and regularly executed by the parties thereto in, to-wit, the month of October, 1890. A true copy of said contract is attached hereto marked "Complainant's Exhibit A-2," and is prayed to be read as a part hereof, the same as though incorporated herein.

7. That for the purpose of fulfilling the contract between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co., and of taking advantage of the terms and conditions and privileges of said contract, an agreement was duly and regularly entered into with the concurrence of all the members of said co-partnership, firm or voluntary association of Pussy, Tiger & Co., whereby Pleasant N. Blackstone and the complainant Clarence W. Turner, who were then and long subsequent thereto partners, doing business as partners under the firm name and style of Blackstone & Turner, agreed to furnish the necessary material, labor and money with which to construct the fence enclosing said pasture as provided for in the contract hereinbefore referred to, to pay to the Creek or Muskogee Nation or Tribe of Indians the sums of money agreed to be paid in consideration of the aforesaid letting of the pasture or grazing contract or privilege to the said firm of Pussy, Tiger & Co., as the same should be due and payable, and to pay in addition in
quarterly installments to each member of the said firm of
9 Pussy, Tiger & Co., the sum of $100 per annum, in consideration whereof the said firm of Pussy, Tiger & Co. agreed that upon the conclusion of the contract aforesaid between it and the said firm of Blackstone & Turner, and of the contract between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co., that the materials entering into the construction of said pasture fence should revert to and become the property of the said firm of Blackstone & Turner, and that said firm of Blackstone & Turner, during the life of the two said contracts should have and receive all sums of money derived from said pasture, the fence enclosing the same and the grazing privileges granted. That said contracts and agreement between the Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co., on the one hand, and the firm of Pussy, Tiger & Co. and the firm of Blackstone & Turner on the other hand, were complied with in each and every particular of said contracts by the said firms of Pussy, Tiger & Co. and Blackstone & Turner.

8. That pursuant to the terms of the aforesaid contract between the Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co. there was paid by and on behalf of said firm of Pussy,

Tiger & Co. to Jacob Knight as judge of the Deep Fork District, the sum of $1,250 on or about the 1st day of April, A. D. 1891, as the first quarterly installment of the sum of $5,000 per annum, being an amount equal to the sum of five cents per acre per annum for each and every acre of land included within said pasture as provided for in the aforesaid contract between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co.

That said sum of $1,250 as the first quarterly installment,
10 as aforesaid, was accepted and received by said Jacob Knight as judge as aforesaid, but subsequently was by him, the said Jacob Knight, tendered to one N. B. Moore, then National Treasurer of said Creek or Muskogee Nation or Tribe of Indians, but the said Moore, in violation of his sworn duty, refused to receive the same. That the said firm of Blackstone & Turner paid to the members of the firm of Pussy, Tiger & Co. in, to-wit, the spring of the year A. D. 1891, the sum of $2,500, being the first quarterly installments at the rate of $100 per annum agreed by said firm of Blackstone & Turner to be paid to each of the several members of the firm of Pussy, Tiger & Co., according to the terms of the contract hereinbefore set forth. That said firm of Blackstone & Turner further furnished the necessary amount of posts, wire and other materials necessary to construct a good substantial pasture fence of four strands of barbed wire enclosing the pasture of 100,000 acres, provided for in the contract between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co. That said firm of Blackstone & Turner contracted for the erection of said pasture fence with one John D. Moore, said Moore agreeing to construct said fence, which was to be of the total length of approximately ninety miles, for the sum of $36 for each and every mile of said fence so constructed and an additional sum of $2 for each and every gate placed in said fence. That in fulfillment of said contract between the firm of Pussy, Tiger & Co. and the firm of Blackstone & Turner there was set by the said John D. Moore the full ninety

miles of posts for said fence and sixty miles of wire was
11 strung thereon, and the John D. Moore aforesaid had distributed along the route of said fence ready to be strung and fastened the remainder of the wire for the completion of said fence at the time of the grievances hereinafter referred to. That as constructed at the time of the grievances hereinafter referred to, and as the contract between the said firm of Blackstone & Turner and said John D. Moore provided the balance of the said fence should be constructed, the said fence consisted of posts set thirty feet apart with two stays between each pair of posts, with gates at every mile and at every road, the same being constructed in a good and substantial manner with four strands of barbed wire and the same complying in each and all respects with the contract hereinbefore set forth between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co.

9. That the firm of Blackstone & Turner subsequent to the agreement between said firm and the firm of Pussy, Tiger & Co. aforesaid, for the purpose of taking advantage of said contract and of making

a profit thereout, entered into a contract or agreement for the use of said enclosed pasture of 100,000 acres, more or less, with Daniel Wagoner & Son and W. T. Wagoner, a co-partnership of cattlemen, doing business under the firm name and style of Daniel Wagoner & Son, providing for the use and occupation of said pasture for the term of three years by said firm of Daniel Wagoner & Son for and at a consideration to be paid by said Daniel Wagoner & Son to said firm of Blackstone & Turner of $27,500 per annum for each and every year of the full term of three years during which said pasture was to continue to exist under the terms and the lawful con-
12 tract between the said Creek or Muskogee Nation or Tribe of Indians and the said firm of Pussy, Tiger & Co. That the said firm of Daniel Wagoner & Son at that time were large owners of and dealers in cattle; that their business required the pasturing of large numbers of cattle within confines; that the said firm of Daniel Wagoner & Son was solvent and ready and willing to comply with its said contract with the firm of Blackstone & Turner and stood ready and willing to pay to the said firm of Blackstone & Turner, for the privilege of grazing its cattle within the lands herein described, the full sum of $27,500 per annum for the full term of three years as aforesaid, or a total of $82,500 for the three years during which said contract was to run. That said firm of Daniel Wagoner & Son continued solvent and abundantly able and ready to comply with its contract during the entire term of three years provided for in their said contract with Blackstone & Turner.

10. That during the period of construction of the pasture fence aforesaid, threats were made by the responsible authorities of the Creek Nation that, notwithstanding the act passed by the National Council of the Creek or Muskogee Nation or Tribe of Indians as aforesaid, and the contract between said Creek Nation or Tribe of Indians, executed through Jacob Knight, as District Judge of the Deep Fork District, and the firm of Pussy, Tiger & Co., and notwithstanding the contract just aforesaid had been and was being complied with in each and every particular by the said firm of Pussy, Tiger & Co., that they, the said responsible authorities of the Creek or Muskogee Nation or Tribe of Indians, would not
13 permit the erection and continued operation of the pasture fence and the maintenance of the pasture as provided. That L. C. Perryman, the Chief of the Creek or Muskogee Nation or Tribe of Indians; Jacob Knight, the District Judge as aforesaid; N. B. Moore, the National Treasurer of the Creek or Muskogee Nation or Tribe of Indians, and Ispachachar, a leading member of the Creek or Muskogee Nation or Tribe of Indians, announced their hostility to the law and to the pasture fence erected or in course of erection pursuant to said law and threatened the destruction of said fence. That thereupon, after the destruction of said fence had been attempted in part and after threats of further violence, Wagoner & Son, because of the injury and pecuniary loss that said firm would suffer through the violent destruction and removal of said fence, applied to the United States District Court in the Indian Territory for an injunction to restrain and enjoin said L. C. Perryman and

Jacob Knight from carrying out their threats to destroy the pasture fence hereinbefore referred to. That the United States District Court duly and regularly issued an injunction after cause shown, restraining and enjoining said L. C. Berryman and Jacob Knight from damaging the wire fence surrounding the pasture hereinbefore referred to or from interfering with the cattle and property contained therein. A true copy of the said proceedings in the United States District Court is attached hereto, marked "Complainant's Exhibit A-3," and is prayed to be read as a part hereof, the same as though incorporated herein. That notwithstanding said injunction of the United States District Court, threats were openly made and were known to the responsible authorities of the Creek or Muskogee
14 Nation or Tribe of Indians that the said pasture fence would be destroyed, and that the operation and maintenance of the said pasture would not be permitted, said threats being made in part by responsible authorities of the Creek or Muskogee Nation or Tribe of Indians themselves, and in part by other irresponsible Indians incited thereto in more or less degree by the responsible authorities of the Creek or Muskogee Nation or Tribe of Indians. That notwithstanding these threats and their knowledge of the imminent danger of the destruction of the pasture fence hereinbefore referred to by a mob and by irresponsible Indians, the responsible authorities of the Creek or Muskogee Nation or Tribe of Indians took no steps whatever for the protection of the pasture fence hereinbefore referred to and for the maintenance of law and order and the protection of the rights of the parties interested in the construction and maintenance of the said pasture fence. That on the contrary the responsible authorities of the Creek or Muskogee Nation or Tribe of Indians permitted a mob of Indians to assemble to terrorize those persons engaged in the construction of the pasture fence aforesaid, and finally effectually to destroy said pasture fence and the materials on the ground for the completion of said pasture fence by cutting down the posts and burning and destroying the materials composing said pasture fence. That on, to-wit, the — day of June, A. D. 1891, a mob of Indians of the Creek or Muskogee Nation or Tribe, said mob being composed of N. B. Moore, national treasurer, as aforesaid, of the Creek or Muskogee Nation or Tribe of Indians; Ispachachar, aforesaid, a leading chief of the Creek or Muskogee Nation
15 or Tribe of Indians, and other responsible authorities of the Creek or Muskogee Nation or Tribe of Indians, did, in the night time, threaten the lives of those persons engaged in the construction and preservation of the aforesaid pasture fence and did burn, tear down, destroy and render valueless the posts, wire and other materials of which the said pasture fence was constructed, or that was upon the route of said fence ready for erection. That the value of the labor and material so destroyed was, to-wit, the sum of $12,046.62. That of the materials composing the said pasture fence there was subsequently recovered by the said firm of Blackstone & Turner materials to the *sum* of $1,968.46 leaving a direct loss in labor and materials composing said pasture fence to the firm of Blackstone & Turner of $10,078.16. That by reason of the destruc-

tion of the said pasture fence, as aforesaid, which said pasture fence and the use to which the same was to be put, was well known to the Creek or Muskogee Nation or Tribe of Indians, the said firms of Pussy, Tiger & Co. and of Blackstone & Turner were unable to comply with the terms of its contract each with the other and of Blackstone & Turner with the aforesaid firm of Daniel Wagoner & Son, and lost the value of the use of said pasture by said firm of Daniel Wagoner & Son for the full period of three years as provided for in the contract between said firm of Blackstone & Turner and Daniel Wagoner & Son, and said lease amounting for the full period of three years to the sum of $82,500. That subsequent to the destruction of the said pasture fence as aforesaid the responsible authorities of the Creek or Muskogee Nation or Tribe of Indians announced their continued hostility to the erection or reconstruction of
16 said pasture fence, and by reason of threats, intimidations and the violence threatened or attempted on the part of responsible authorities of the Creek or Muskogee Nation or Tribe of Indians and of Indian citizens and members of said Creek or Muskogee Nation or Tribe of Indians, and the refusal of protection to them in their lawful rights, the said firm of Blackstone & Turner were unable again to build said pasture fence, and an attempt at reconstruction of the same would have but entailed further and additional loss of property, and have endangered the lives of those persons concerned in the re-erection of said pasture fence, so that said firms of Pussy, Tiger & Co. and Blackstone & Turner were utterly unable, during any of the three years of the life of the contract hereinbefore set forth, to make use of the enclosed pasture provided for in the contracts between the Creek or Muskogee Nation or Tribe of Indians and the firm of Pussy, Tiger & Co. and the firms of Blackstone & Turner and Daniel Wagoner & Son.

11. That subsequent to the destruction of the said pasture fence as aforesaid it was agreed by and between the aforesaid firms of Pussy, Tiger & Co. and Blackstone & Turner, that in consideration of the assumption by said firm of Blackstone & Turner of any and all losses arising or accruing by the means aforesaid, that there should be assigned over to said firm of Blackstone & Turner any and all claims of any of the parties to the said agreement against the Creek or Muskogee Nation or Tribe of Indians. That the said firm of Blackstone & Turner did, as agreed, assume all the debts and liabilities and losses of the said firm of Pussy, Tiger & Co. and said firm of Pussy, Tiger & Co. on condition thereof did
17 assign and set over to the firm of Blackstone & Turner all their rights and claims against the Creek or Muskogee Nation or Tribe of Indians on account of the acts and grievances hereinbefore set forth. That the losses and damages accruing to and the value of the claim on account thereof against the Creek Nation or Tribe of Indians is as follows:

| | |
|---|---|
| Materials destroyed (after deducting $1,968.46, the value of materials recovered) | $10,078.16 |
| Interest on the same at 6 per cent from June 5, 1891, to Sept. 5, 1908 | 10,430.87 |
| Amount paid to members of the firm of Pussy, Tiger & Co. and not returned | 2,500.00 |
| Interest on the same from March, 1891, to Sept. 5, 1908. | 2,582.50 |
| Amount paid to Jacob Knight for the Creek or Muskogee Nation or Tribe of Indians | 1,250.00 |
| Value of the loss of the pasture | 82,500.00 |
| Interest on the same from June 5, 1891, to Sept. 5, 1908. | 85,387.50 |
| Total | $194,729.03 |

That the only set-offs against this lease are the sums of $1,250, the amount paid by the firm of Pussy, Tiger & Co. to Jacob Knight, judge of the Deep Fork District, as aforesaid, and which said sum subsequently was returned by the said Jacob Knight to or for the benefit of the firm of Blackstone & Turner, the sum of $15,000 being at the rate of $5,000 per annum agreed to be paid by Pussy, Tiger & Co. to the Creek or Muskogee Nation or Tribe of Indians for the privilege of using and enclosing the pasture aforesaid, and
18 the sum of $27,500, being at the rate of $10,000 per annum agreed to be paid by the firm of Blackstone & Turner to the individual members of the firm of Pussy, Tiger & Co., and of which the sum of $2,500 only was actually paid as aforesaid, the net loss of complainant and his claim against the Creek or Muskogee Nation or Tribe of Indians therefore being $105,698.03.

12. That at the time of the acts and grievances aforesaid, the Creek or Muskogee Nation or Tribe of Indians held its title to all the lands and property of the said Creek or Muskogee Nation or Tribe of Indians in common; that the individual members composing the said mob which destroyed the pasture fence aforesaid, were none of them solvent or able to respond in damages, so that your petitioner and those through whom he claims, were not able at any time to recover the losses or damages aforesaid directly from the parties immediately participating in and causing said loss. That the claim of your petitioner was several times submitted to the Creek or Muskogee Nation or Tribe of Indians, and was investigated by commitees of the National Council of said Creek or Muskogee Nation or Tribe of Indians and reports made in favor of the responsibility or liability of the said Creek or Muskogee Nation or Tribe of Indians therefor, but the same never was paid. That the facts and the law with relation to said pasture fence were duly and regularly submitted to the Supreme Court of the Creek or Muskogee Nation or Tribe of Indians, and it was by said court determined that the said pasture fence was lawfully erected and was a lawful enclosure made pursuant to law and in accordance with the contract or agreement between the parties to
19 the erection of said pasture fence. A true copy of the finding of said Supreme Court is attached hereto marked "Complain-

ant's Exhibit A-4," and is prayed to be read as a part hereof, the same as though incorporated herein.

13. That the firm of Blackstone & Turner became insolvent and that Pleasant N. Blackstone aforesaid died on, to-wit, the — day of April, A. D. 1903, and that your petitioner is the sole surviving partner of said firm, and by assignment holds the entire right, claim and interest in the aforesaid claim against the Creek or Muskogee Nation or Tribe of Indians.

14. That by Section 26 of the Act approved May 29, 1908, entitled "An Act to Authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes," it was provided as follows:

"Sec. 26. That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

The premises considered, you complainant prays that a judgment may be rendered by this Honorable Court in his favor against the Creek or Muskogee Nation or Tribe of Indians for the sum of $105,698.03. And for such other and further action and relief as the nature of the case may require and as to the Court may seem meet and just.

C. W. TURNER, *Complainant.*
KAPPLER & MERILLAT,
*Attorneys for Complainant.*

BUTLER & VALE,
*Of Counsel.*

COUNTY OF MUSKOGEE,
*State of Oklahoma, ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated of my own personal knowledge are true, and those stated on information and belief I believe to be true.

C. W. TURNER.

Subscribed and sworn to before me this 14th day of August, A. D. 1908.

[SEAL.] WIRT K. WINTER,
*Notary Public.*

My commission will expire Sept. 17, 1908.

COMPLAINANT'S EXHIBIT "A-1."

COURT HOUSE, DEEP FORK DIST., M. N., Sept. 30, 1890.

21 To the Hon. Jacob Knight, Judge Deep Fork Dist.

SIR: We the citizens of the Muskogee Nation do hereby ask you to give us an election to build a pasture in the said District according to the laws of this Nation enacted October 6th, 1889.

Boundary line thus to commence: Northwest corner of this District running south on the Sac and Fox line to the North Fork River, thence down said river Twenty-five miles more or less and thence north to the Deep Fork River, thence west up said river of Deep Fork, to the starting point, to be not less than One Hundred thousand acres.

PUSSY, TIGER & CO.

COURT HOUSE, DEEP FORK DIST, Sept. 30, 1890.

In compliance to the above application, I have this day set October 11, 1890, for an election of pasture, to be held at the Court House of Deep Fork District, M. N.

JACOB KNIGHT,
*Judge Deep Fork Dist.*

D. C. WATSON, *Clerk.* [SEAL.]

COURT HOUSE, DEEP FORK DIST., M. N., October 11, 1890.

Election held this day above dated, for a pasture according to the application of Pussy, Tiger & Co., as follows, to-wit:

22 Fifty-nine for, and thirty against, and the pasture elected by Twenty-nine majority.

Thereby the pasture entitled.

I hereby certify that the above election is just and correct and held according to the laws of the Muskogee Nation.

Given under my hand and signature this day above dated.

JACOB KNIGHT,
*Judge Deep Fork Dist., M. N.*

D. C WATSON, *Clerk.*

COMPLAINANT'S EXHIBIT "A-2."

Contract and agreement, made and entered into this — day of October, 1890, by and between Jacob Knight, Judge of the Deep Fork District, Creek Nation, he being duly authorized in the premises under the act of the National Council of October 6th, 1889, and Pussy, Tiger & Co., citizens of the Creek Nation.

This contract witnesseth—

That Jacob Knight, Judge of the Deep Fork District, Creek Nation, hereby contracts with and licenses Pussy, Tiger & Co., they having complied with all the provisions and requirements of the pasture act of October 6th, 1889, precedent to entering into this con-

tract, to enclose a certain pasture in the Deep Fork District, Creek Nation, for a period of three years from date, described as follows:

23 Beginning at a stone on the boundary line between the Sac and Fox and Creek Nations, two miles more or less southeast of the Sac and Fox Agency, running thence south sixteen miles; thence easterly twenty-five miles; thence northerly sixteen miles; thence westerly twenty-five miles to place of beginning, not less than one hundred thousand acres.

That Pussy, Tiger & Co., on their part agree to build good and substantial fence of four strands of barbed wire, enclosing the tract of country hereinabove described and bind themselves to comply with all the provisions of the Act of October 6th, 1889, and which act is made a part of this contract.

(Signed) JACOB KNIGHT,
*Judge Deep Fork Dist., M. N.*
D. C. WATSON, *Clerk.*

MOTEY TIGER, *Pres.*
JOHN PUSSY, *V. Pres.*
J. S. ROBISON, *Sec't'y.* [SEAL.]

COMPLAINANT'S EXHIBIT "A-3."

In the United States Court, in the Indian Territory, First Judicial Division.

DANIEL WAGONER and W. T. WAGONER, Doing Business under the Style of Daniel Wagoner & Son, Plaintiffs,
vs.
L. C. PERRYMAN and JACOB KNIGHT, Defendants.

*Complaint in Equity.*

24 To the Hon. James S. Shackleford, Judge of the United States Court, in the Indian Territory, for the First Judicial Division:

Your complainants, Daniel Wagoner and W. T. Wagoner, citizens of the United States, and not members of any Indian tribe, would respectfully show to the Court, that on the 11th day of October, 1890, certain citizens of the Creek Nation, under and by virtue of the law in such cases provided, being a law passed by the National Council of the Creek Nation, October 6th, 1889, contracted and agreed with Jacob Knight, then and now a Judge of the Deep Fork District of the Creek Nation, who being duly authorized by law to act in the premises, for a certain pasture, described as follows:

Beginning at a stone on the boundary between the Sac and Fox and Creek Nations, two miles more or less southeast of the Sac and Fox Agency, running thence south sixteen miles, thence

east twenty-five miles, thence north sixteen miles, thence westerly twenty-five miles to the place of beginning, not less than one hundred thousand acres; for a valuable consideration as will more fully appear by reference to said contract, a copy of which is herewith filed, marked Exhibit A, and asked to be made a part of this bill.

That said citizens of the Creek Nation, Pussy, Tiger & Co., were entitled to said franchise and lease for the period of three years from the date of the aforesaid contract. That the laws of the Creek Nation in regard to the payment of license fees, were and have been fully complied with. That large sums of money have been expended under the aforesaid contract.

25 That subsequently by the consent and agreement of all parties in interest, your complainants sub-leased the pasture aforesaid for the purpose of grazing cattle.

That in pursuance to the terms of the permit or grant of the Creek Nation and the agreement substituting your complainants to the rights and privileges of the aforesaid contract your complainants paid the taxes required by law and proceeded to and did build a fence with wire around the pasture mentioned in the aforesaid contract, namely, two hundred and fifty thousand acres, more or less, situated in the western part of the Creek Nation and the eastern line of the Sac and Fox Reservation on the waters of the Deep Fork and North Fork Rivers.

That the complainants paid in addition to the taxes paid the Nation, and the money expended for the improvements aforesaid, large sums of money for the use and occupation of the said pasture, to their lessors.

Your complainants further allege that they have spent [all the rights and improvements of persons who were settled within the limits of said pasture were either purchased or settled for amicably, and your complainants are not interfering with the right or privilege of any member of the Creek tribe,*] and that their right to the enjoyment of the same is derived [from all persons who had any claim thereto, as well as*] from the consent of the authorized officers of said tribe or nation, and further complaining, they say that said grant or permit was in accordance with the laws; customs and usages of said tribe, and contravened no law of the United States.

They further show that on the — day of —— 1891 a notice

26 or order purporting to come from L. C. Perryman, the proper agent of the Creek Nation, was issued to Jacob Knight, Judge of the Deep Fork District of said Nation, to destroy and remove the wire fences, of your complainants.

Your complainants further show that such action would be in violation of the solemn and lawful contract entered into by the Creek Nation through its authorized officer.

That it would result in great pecuniary loss to them in the destruction of their said pasture in which are now lawfully held a large number of cattle, in injury to and loss of said cattle if turned

* Matter enclosed in parentheses stricken out in copy.

at large and scattered, and in the total destruction of said wire fence, which said loss and privation thus inflicted, without regular allegations, opportunity to answer, or trial, would injure and damage the said complainants in the sum of twenty-five thousand dollars, would contravene and be in violation of the laws of the United States, as well as against equity and good conscience.

That in consequence of such order, a portion of said wire fence has already been destroyed by irresponsible persons. That should said order be carried out, that the parties to whom it is given and who would execute the same are either under no bond at all or an insufficient one to answer to the complainants for the damages they would sustain thereby, and that none of them have property sufficient to do so.

The plaintiffs further allege that said defendants, their agents, or those acting under their direction, will, they are informed and believe, unless restrained and enjoined by this Honorable Court,
tear down and remove said wire fence to the great and ir-
27 reparable injury of the complainants, and that they are
without remedy save in this court. Said defendants being unable to respond in damages for the said wrongs and privations.

Wherefore, said complainants pray that the said defendants, L. C. Perryman and Jacob Knight, be commanded by proper process to appear in this court and answer the premises and abide and perform such order or decree as may be passed, and that they and their agents, and all persons whomsoever in the meantime, *and* forthwith enjoined and restrained from tearing down or removing said fence around said pasture or from interfering with or in any manner intermeddling with said fence or pasture* and for other proper relief.

W. T. HUTCHINGS,
*Attorney for Complainants.*

Dan Wagoner says he is one of the complainants in the above and foregoing complaints and that he believes the statements made therein are true.

D. WAGGONER.

Subscribed and sworn to before me this 4th day of May, 1891.
[SEAL.] GEO. H. WILLIAMS,,
*Notary Public, 1st Div.*

28 Endorsed as follows: No. 1102. Dan Waggoner & Son vs. L. C. Perryman & Jacob Knight. Taxed. Complaint in Equity for Injunction. Filed May 4, 1891. Wm. Nelson, Clerk. W. T. Hutchings, Attorney for Plaintiff.

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*Written on margin: the cattle of the defendant, the grazing privilege, or any of the property, rights and franchises of the defendants, whatsoever.

United States Court for the Indian Territory, at Chambers.
James M. Shackleford, Judge.

MUSKOGEE, IND. TER., May 5, 1891.

No. 1102.

DAN WAGGONER & SON
vs.
L. C. PERRYMAN and JACOB KNIGHT.

*Application for Restraining Order.*

The hearing of the application for a restraining order in the above entitled cause will be postponed until Monday, the 11th of May, 1891, at 10 o'clock, or so soon thereafter as the same can be heard.

JAMES M. SHACKLEFORD,
*Judge U. S. Court.*

May 5, 1891.

Endorsed as follows: Filed May 5, 1891. Wm. Nelson, Clerk.

In the United States Court, in the Indian Territory, First Judicial Division.

29 DANIEL WAGGONER and W. T. WAGGONER, Doing Business under the Firm Name of Daniel Waggoner & Son, Plaintiffs,
vs.
L. C. PERRYMAN and JACOB KNIGHT, Defendants.

On the complaint of the plaintiffs duly verified, and for reasons apparent to the court, it is hereby ordered that the defendants show cause, if any they have, before me at chambers in the town of Muskogee in the First Judicial Division in the Indian Territory, on the 7th day of May, 1891, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not be issued restraining them from, interfering with, cutting down or damaging the wire fence surrounding the pasture leased by the Creek Nation to Pussy, Tiger & Co., on the 11th day of October, 1890, and from interfering with any of the rights, privileges and franchises granted in said lease, and for such other and further relief as may be just; and it is further ordered that said defendants, their agents and servants be in the meantime restrained, and they, the said defendants, are and each of their agents and servants is hereby forbidden to suffer or commit any of said acts until the further order of the court.

[SEAL.] JAMES M. SHACKLEFORD,
*Judge U. S. Court.*

I hereby certify the foregoing is a true and exact copy of the original.

WM. NELSON, *Clerk,*
By W. M. SHACKLEFORD, *Deputy.*

30 I served the within upon L. C. Perryman & Jacob Knight by delivering a copy thereof to them on the 9th May, 1891.
[SEAL.] WM. ROBISON.

Subscribed and sworn to before me this 11 May, 1891.

GEO. H. WILLIAMS,
*Notary Public, 1st Div.*

Endorsed as follows: No. 1102. Dan Waggoner & Son vs. L. C. Perryman & Jacob Knight. Notice of Application for Injunction. Taxed.

In the United States Court in the Indian Territory, First Judicial Division.

DANIEL WAGGONER and W. T. WAGGONER, Doing Business under the Firm Name of Daniel Waggoner & Son, Plaintiffs,
vs.
L. C. PERRYMAN and JACOB KNIGHT, Defendants.

On the complaint of the plaintiffs duly verified, and for reasons apparent to the court, it is hereby ordered that the defendants show cause, if any they have, before me at Chambers in the town of Muskogee, in the First Judicial Division in the Indian Territory, on the 7th day of May, 1891, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunc-
31 tion should not be issued restraining them from interfering with, cutting down or damaging the wire fence surrounding the pasture leased by the Creek Nation to Pussy, Tiger & Co., on the 11th day of October, 1890, and from interfering with any of the rights, privileges and franchises granted in said lease, and for such other and further relief as may be just; and it is further ordered that said defendants, their agents and servants, be in the meantime restrained, and they, the said defendants, are and each of their agents and servants is hereby forbidden to suffer or commit any of said acts until the further order of the court.

JAMES M. SHACKLEFORD,
*Judge U. S. Court.*

Endorsed as follows: No. 1102. Dan Waggoner & Son vs. L. C. Perryman and Jacob Knight. Order granting a Temporary Restraining order and notice of Application for Injunction. Taxed.

In the United States Court in the Indian Territory, First Judicial Division.

DAN WAGGONER & SON, Plaintiffs,
vs.
L. C. PERRYMAN and JACOB KNIGHT, Defendants.

We undertake that the plaintiffs, Daniel Waggoner &
32 Son, shall pay to the defendants, L. C. Perryman and Jacob Knight, all damages, not exceeding five thousand dollars, which they, or either of them, may sustain by reason of the temporary restraining order in this act, if it is finally decided that the said order should not have been granted.

(Signed) D. WAGGONER & SON.
(Signed) C. W. TURNER.
(Signed) P. N. BLACKSTONE.

Endorsed as follows: No. 1102. Dan Waggoner & Son vs. L. C. Perryman and Jacob Knight. Bond for Restraining Order. Filed May 4, 1891. Wm. Nelson, Clerk. Taxed.

In the United States Court for the Indian Territory, First Division.

DAN WAGGONER & SON
vs.
L. C. PERRYMAN and JACOB KNIGHT.

And now comes defendants and demurs to plaintiffs' petition because the same is insufficient and shows no cause of action against defendants and is without equity, and of this they pray the judgment of the court.

(Signed) THOS. MARCUM,
(Signed) S. S. FEARS,
*Att'ys for Def'ts.*

33 For special cause of demurrer, def'ts say that the lease set up in said complaint to plaintiffs—the basis of plaintiffs' claim, is illegal and in violation of the laws of the United States and of the Creek Nation and therefore plaintiffs ought not to recover in this cause and of this def'ts pray the judgment of the court.

(Signed) THOS. MARCUM &
S. S. FEARS,
*Att'ys for Def'ts.*

Endorsed as follows: 1102. Dan Waggoner & Son vs. L. C. Perryman and Jacob Knight. Demurrer. Filed Nov. 13, 1891. Wm. Nelson, Clerk. Taxed.

In the United States Court in the Indian Territory, First Judicial Division.

D. WAGGONER & SON, Plantiffs,
vs.
L. C. PERRYMAN and JACOB KNIGHT, Defendants.

Upon reading and filing notice of motion for injunction herein and proof of service thereof, with the verified complaint and exhibits annexed thereto, of the plaintiff-, the same having been duly considered by me, and it appearing that the plaintiffs are
34 entitled to the relief sought therein, now therefore, it is hereby ordered that an injunction be issued pursuant to the prayer of the bill herein, strictly commanding, enjoining said defendants, L. C. Perryman and Jacob Knight, their clerks, attorneys, agents, servants and workmen, under the pain and penalties which may fall upon them and each of them, in cases of disobedience, that they forthwith and until the further order judgment and decree of this court, desist from interfering or meddling with any of the rights, privileges and franchises granted to Pussy, Tiger & Co., the *leases* of the defendants by virtue of the lease made to them of the pasture described therein as follows:

Beginning at a stone on the boundary line between the Sac and Fox and Creek Nations, thence south sixteen miles; thence easterly twenty-five miles; thence northerly sixteen miles; thence westerly twenty-five miles to place of beginning, not less than one hundred thousand acres.

And particularly from cutting down or damaging the wire fence surrounding the said pasture, or interfering with the cattle and property contained therein, but before such order shall be of force and effect the plaintiffs shall enter into a bond payable to the defendants, with good security, in the sum of five thousand dollars.

JAMES M. SHACKLEFORD,
*Judge of the United States Court in the Indian Territory.*

May 11, 1891.

35 Endorsed as follows: No. 1102. Dan Waggoner & Son vs. L. C. Perryman & Jacob Knight. Order, Granting a Preliminary Injunction. Filed May 11, 1891. Wm. Nelson, Clerk.

In the United States Court in the Indian Territory, First Judicial Division.

L. C. PERRYMAN and JACOB KNIGHT, Defendants,
vs.
DANIEL WAGGONER & SON, Plaintiffs.

(*Bond.*)

We undertake that the plaintiffs, Daniel Waggoner & Son, shall pay to the defendants, Jacob Knight and L. C. Perryman, the dam-

ages not exceeding five thousand dollars which they or either of them may sustain by reason of the injunction in this action, if it is finally decided that said injunction should not have been granted.

(Signed) DANIEL WAGGONER & SON,
By W. T. HUTCHINGS, *Att'y.*

(Signed) C. W. TURNER.

Approved May 26, 1891.

JAMES M. SHACKLEFORD,
*Judge U. S. Court.*

36 Endorsed as follows: No. 1102. Dan Waggoner & Son vs. Knight and Perryman. Bond for Injunction. Filed May 26, 1891. Wm. Nelson, Clerk. Taxed.

At the bottom of each of the foregoing papers was attached the following certificate:

STATE OF OKLAHOMA,
*County of Muskogee, ss:*

I, Tony Matney, hereby certify that I am the duly elected, qualified and acting Clerk of the District Court, within and for the Third Judicial District of the State of Oklahoma, County of Muskogee; that, as such Clerk, I am in charge of the files in all cases of a civil nature heretofore filed in the United States Court within and for the Western District of the Indian Territory; and that the annexed and foregoing is a full, true and correct copy, together with all endorsements thereon, of the original now on file in my office.

In Witness Whereof, I have hereunto set my hand, as such Clerk of said District Court, and affixed the seal of said Court, at my office in the city of Muskogee, County of Muskogee, State of Oklahoma, this the 19th day of March, A. D. 1908.

TONY MATNEY,
*Clerk of the District Court within and for the County of Muskogee, State of Oklahoma.*

37 II. *Traverse.*

Filed January 6, 1915.

In the Court of Claims of the United States, December Term, A. D. 1915.

No. 30241.

CLARENCE W. TURNER
vs.
THE UNITED STATES and THE CREEK NATION OF INDIANS.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies

each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
*Assistant Attorney General.*

38 III. *History of Proceedings.*

On January 6, 1915, on motion of claimant made in open Court, the petition as to the United States was dismissed. As to the Creek Nation the case was argued and submitted.

On January 7, 1915, the motion of claimant made in open Court, to set aside the order heretofore made dismissing the petition against the United States was allowed and the submission heretofore made was withdrawn.

39 IV. *Demurrer of Creek Nation.*

Filed Oct. 26, 1915.

Demurrer.

Comes now the defendant, the Creek Nation of Indians, by its National Attorney, R. C. Allen, and without waiving any of the objections urged in its motion to dismiss this cause, but still insisting upon the same, and not confessing any or all of the matters or things alleged in plaintiff's petition to be true, in manner and form as the same are therein set forth and alleged, doth demur to the said petition of the claimant heretofore filed herein on the ground that the same does not state a cause of action in favor of the complainant and against this defendant.

And, for further and specific grounds of demurrer, this defendant says:

1. That no authority is contained in the Act referring this claim to this court to sue the United States, or join the United States in this suit, and the Creek Nation of Indians, being wards of the United States, and possessing no independent functions of government, cannot be sued without joining the United States.

2. That the plaintiff, Clarence W. Turner, a non-citizen of the Creek Nation, could not contract with the tribe or members thereof to use and occupy any part of their public domain, and his contract, forming the basis of this action, was, therefore, void.

3. That the Creek Nation is not liable for the tortuous acts of a mob, even though some of the people composing the mob may have been officers of the tribe.

40 4. It being alleged that the wrongful acts of the mob were committed against Daniel Wagoner & Son, and the claim arising out of the destruction of the property of Daniel Wagoner & Son, and being unliquidated, the same could not be assigned to Turner.

5. That the Creek Indians are wards of the United States, and tribal funds and property of said tribe are in the custody of and

the title thereto vested in the United States, and therefore the same rule applies to assignability of claims against the Creek Nation as applies to the assignability of claims against the United States, and especially is this true when the United States is a party to the action, as in this case, and this being true, Turner, as assignee, cannot maintain this action.

Wherefore, and for divers other good causes of demurrer appearing in said petition, the said defendant doth demur thereto.

Respectfully submitted,

R. C. ALLEN,
*National Attorney, Creek Nation.*

41 V. *Motion of Creek Nation to Dismiss Petition.*

Filed October 26, 1915.

Motion to Dismiss Petition.

Comes now the defendant, Creek Nation of Indians, by its National Attorney, R. C. Allen, and appears specially in this cause, for the purpose of this motion and for no other purpose, and moves the court to dismiss the petition of the complainant for the following reasons, and upon the following grounds, to-wit:

1. That the jurisdictional Act authorizing the institution of this action does not provide upon whom process may be served, and that there is no provision of law designating any officer of the Creek Nation upon whom service of process may be had; that no citation, subpœna or other process has ever been issued or served by which this court has acquired, or may acquire, jurisdiction over the Creek Nation of Indians.

2. That there is a misjoinder of parties defendant.

3. That the petition of plaintiff shows affirmatively that the claim of plaintiff arises in tort.

4. That the contract set out in the petition of claimant, forming the basis of his claim, is clearly violative of Section 2116 of the Revised Statutes of the United States, and is, therefore, void.

5. That the assignment of the claim herein sued upon to the plaintiff, Clarence W. Turner, is clearly violative of Sections 3477 and 3737 of the Revised Statutes of the United States, and, therefore, void.

R. C. ALLEN,
*National Attorney, Creek Nation.*

42 VI. *Objection of United States to Being Made Party Defendant.*

Filed November 30, 1915.

Now come the United States, by their Attorney General, and deny the jurisdiction of this court under Section 26 of the Act of May

29, 1908, (35 Stat., 457) to make the said United States a party defendant in the above entitled suit.

HUSTON THOMPSON,
*Assistant Attorney General.*

43 VII. *Argument and Submission of Case.*

On November 29, 1915 the defendants' motion to dismiss and demurrer were argued by Mr. R. C. Allen for the Creek Nation, and by Mr. Charles H. Merillat for the claimant, and argument continued until tomorrow.

On November 30, 1915 the argument was continued by Mr. George M. Anderson for the defendants on the question of jurisdiction. Mr. Charles H. Merillat and Mr. Marion Butler argued in opposition to defendants' motion to dismiss and demurrer, and the said motion and demurrer were submitted.

44 VIII. *Answer of Creek Nation to Petition.*

Filed December 1, 1915.

Answer to Petition.

Comes now the defendant, Creek Nation of Indians, by its National Attorney, R. C. Allen, and not waiving all or any of the objections urged in its motion to dismiss, or its demurrer, heretofore filed herein, but insisting upon the same, and for its answer to the petition of complainant, denies generally and specifically each and every material allegation in said petition contained.

For further answer to the petition of complainant, this defendant says that the pretended claim of the plaintiff is, and at the time of the institution of this action was, barred by both the three and five-year statutes of limitation in force in the Indian Territory from the time this cause of action arose until the institution of same in this court, said statutes of limitation being sections 2945, 2950 and 2955 of Indian Territory Statutes, and this defendant now pleads the said statutes of limitation in bar of a recovery of any sum upon said claim.

Further answering, this defendant says that the pretended claim of the plaintiff is founded upon an alleged contract between the Creek Nation and Pussy, Tiger & Company, which was, and is, violative of Section 2116 of the Revised Statutes of the United States, and, therefore, void, and this defendant now pleads said statute in bar of a recovery of any sum upon said claim.

45 Further answering, this defendant says that the assignment of the said pretended claim to the complainant was, and is, in violation of Sections 3477 and 3737 of the Revised Statutes of the United States, and, therefore, void, and this defendant now pleads such statute in bar of the recovery of any sum upon said claim.

Wherefore, the defendant, the Creek Nation of Indians, prays that it may be permitted to go hence with its costs, and for such other and further relief as to the court may seem just and proper.

R. C. ALLEN,
*National Attorney for Creek Nation.*

46 IX. *History of Further Proceedings.*

On January 17, 1916 the Court filed an order filing tentative findings of fact.

On March 16, 1916 the claimant filed a motion to amend tentative findings of fact.

On March 16, 1916 the defendants (the Creek Nation) filed objection to claimant's motion to amend tentative findings of fact.

On March 16, 1916 the case was argued and submitted on tentative findings, and motion to amend tentative findings by Messrs. Charles H. Merillat and Marion Butler for the claimant and Mr. R. C. Allen for the defendants.

47 X. *Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed April 10, 1916.

This case having been heard by the Court of Claims, the court, upon the evidence, files the following

*Findings of Fact.*

I.

The claimant, Clarence W. Turner (whose place of residence is Muskogee, Oklahoma), is the surviving partner of the firm of Blackstone & Turner, which was composed of Pleasant N. Blackstone and Clarence W. Turner. Said firm engaged in the business of raising and selling cattle in the year 1890 and before and after that year. The said Blackstone died on or about the — day of April, 1903.

II.

A treaty between the United States and the Creek Nation of Indians was concluded June 14, 1866, and proclaimed by the President August 11, 1866, 14 Stats., 785, whereby certain rights were secured to the respective parties to the treaty. Among others, the Creeks ceded and conveyed to the United States the west half of their entire domain, estimated to contain over three million acres, and the United States were to pay 30 cents per acre therefor. By Article X of said treaty it was provided as follows:

"The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better admin-

istration of justice and the protection of the rights of person and property within the Indian Territory: Provided, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs. The Creeks also agree that a general council, consisting of delegates elected by each nation or tribe lawfully resident within the Indian Territory, may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as are hereinafter described * * *."

48 III.

The said Creek Nation of Indians kept up their tribal organization and customs and had a system of laws for many years and until the year 1906, at which date the tribal government was terminated by the general provisions of the act of March 1, 1901, 31 Stats., 861, 872, section 46 of which reads as follows:

"46. The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper."

The United States held in trust for the Creek Nation of Indians on November 18, 1915, the sum of $1,325,167.16. In addition thereto approximately $1,110,000 of the tribal funds of said nation is on deposit in the Oklahoma State and national banks, under the provisions of the act of March 3, 1911, 36 Stat., 1058, 1070, or a total of $2,435,167.16.

Under their constitution it was provided that the lawmaking power of the nation was lodged in a council, consisting of two houses—the house of kings and the house of warriors; that there should be a principal chief elected for a term of 4 years by a majority of the votes of the male citizens of the Muskogee Nation who had attained the age of 18 years; that the "supreme law-defining power" should be lodged in a high court composed of 5 citizens over the age of 25 years, chosen by the national council; that the nation should be divided into 6 districts, and that each district should be furnished with a judge, a prosecuting attorney, and a company of light horsemen—one captain and 4 privates, and the light horsemen were to be vested with police powers and were under the direction of the judge of the district. The national treasurer was selected by the national council, and his duty was to receive and receipt for all national funds and to disburse the same, as should be provided for by law. He was required to report the condition of the national finances to the national council and was required to give a bond in the sum of $5,000. Their laws also provided with reference to intermarried noncitizens as follows:

"Article III. Intermarried Noncitizens.

"Section 1. All noncitizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands, and in case of removal

from the limits of our nation shall not have the right to sell their improvements, provided that such person shall satisfy the principal chief as to their good character and honest intentions, and provided that the principal chief shall grant to such person permit to reside in the nation during good behavior."

Other provisions of their laws and acts amendatory of the statute of 1889 hereafter mentioned may be found in an official publication entitled "Constitution and Laws of the Muskogee Nation, 1893."

## IV.

In the year 1889 the said lawmaking power of said Creek Nation of Indians enacted the following:

"Whereas certain citizens of the Muskogee Nations have petitioned the national council representing that a few citizens engaged
49 in the cattle interests have entered large areas of the public domain for their exclusive use in the grazing of cattle, which operate to the detriment of many who live in the vicinity of such inclosures; and

"Whereas it is complained that a dangerous monopoly of the natural advantages of the country is thereby threatened to the detriment of the general welfare of the nation; and

"Whereas it appears to be desirable that some protection should be afforded the live-stock interest of our citizens against the influx of large herds of cattle into our country from neighboring nations; and

"Whereas it is the desire of the nations, in view of these surrounding conditions, to provide as near as may be such remedial legislation as will afford the protection and benefits desired without unreasonable detriment to the interest of either of the classes of citizens in interest: Therefore

"Be it enacted by the national council of the Muskogee Nation, That any citizen, head of a family, engaged in the keeping or grazing of live stock in this nation, shall for that purpose be entitled to inclose for his exclusive use, free of any manner of tax, 1 mile square of the lands of the public domain, but such inclosures shall not intrude on the rights of any other citizen without his or her consent.

"Be it further enacted, That all persons who entered pastures greater in extent than 1 mile square prior to the passage of this act are hereby permitted to occupy and use the same for the purpose of holding and grazing stock thereon until the first day of May, 1890, at which date they are hereby required to raze and take down the fences forming the inclosures.

"Be it further enacted, That if the owner or owners of any pasture subject to removal under the provisions of this act shall fail to take down and remove or make due and diligent efforts to effect such removal within 10 days after the said first day of May, the judge of the district wherein such pasture is located shall cause the light-horse company to take down the fences inclosing the same. If by reason of resistance offered by the owners of such inclosures they shall be unable to take such fences down, then it is hereby made the duty of the principal chief to call into service a sufficient number of

the citizens of the district who, under the direction of the light-horse captain, shall proceed to take the fences down as hereinbefore provided.

"Be it further enacted, That where extensive pastures greater in extent than 1 square mile can be located on the borders of the nation to the benefit of any neighborhood by affording protection against the influx of stock from adjoining nations, the same may be located under the following conditions, to wit: The judge of the district shall be notified by any number of citizens of the district of their desire for the establishment of such protective pasture or pastures; he shall then give due notice to the people of the neighborhood of the time and place of a meeting of voters, who, when so convened, shall determine by vote, or as they shall deem proper, the question whether or not such pastures are needed. If it shall appear by a majority of persons of voting age of the neighborhood thus to be protected favor the establishment of such pastures, it shall then be the duty of the judge to let or grant only the privilege of holding and grazing stock on such lands to such citizen or citizens as may by contract bind themselves to build a substantial fence of four or more strands of wire and to pay for said grazing privileges an amount per acre per year that shall not be less than 5 cents. The location of such tract or tracts of land as shall be occupied under the provisions of this act shall be described in the body of the contract, which contract shall include all provisions necessary to insure and protect the interests of the nation and the citizens thereof and shall be in force for the period of three years, with the privilege of renewal.

"Be it further enacted, That pastures greater in area than 1 mile square which have been inclosed prior to the enactment of this law which operate already as a protection to any neighborhood or portion of country against the drifting in of stock from surrounding countries may remain unmolested when the same shall be requested as provided in the section next preceding. In such cases, however, the judge is hereby directed to contract with the persons owning the pastures, which contract shall be subject to all the conditions imposed in the preceding section of this act. It is further required that all pastures remaining intact or which shall be built under the provisions of this act shall be provided on all sides with gates 10 feet wide at the distance of 1 mile or about 1 mile apart; and if stock of any kind escape from such inclosures and cause loss or damage to any citizen, it shall be the duty of the judge of the district, when complaint is made, to proceed, with two disinterested persons, and assess the damages, which shall be paid by the owners or managers of the pastures.

"Be it further enacted, That the judge contracting with the owners of the pastures shall make collection of the tax of 5 cents per acre per year provided under this act, commencing his assessments from the date of contract, which he shall pay into the national treasury on the first day of each quarter, beginning, respectively, with the months of January, April, July, and October of each year. He shall also render to the national council a full report of all moneys

collected, together with receipts from the national treasurer. And if any owner of pasture shall fail to make any quarterly payment or fail to comply with any of the obligations embraced in the contract with the judge, then he shall forfeit all the franchise granted by the terms of his contract, and the district judge shall so declare and enforce such forfeiture.

"Be it further enacted, That this act shall take effect from and after its passage, and the principal chief is hereby authorized to furnish printed copies thereof to each district judge, who shall distribute them to all interested parties.

"Approved October 26, 1889.

"L. C. PERRYMAN,
*"Principal Chief, M. N."*

Several instances are shown by the evidence where under said act "noncitizens" made arrangements with "citizens" that the latter should apply for the right to have a pasture and upon its being granted the noncitizens would use it for pasturage and pay the citizens who had secured it.

V.

Said Clarence W. Turner had resided among said Creek Nation of Indians from the early seventies. In 1883 he married the
51 daughter of an Indian of Cherokee blood named Butler, who had been adopted prior to the Civil War into the Creek Nation of Indians, and she was raised as a Creek and was given an allotment of land among the Creeks. The said Pleasant N. Blackstone was of Cherokee blood and was not a citizen of the Creek Nation of Indians.

VI.

After the said enactment authorizing pastures to be established the said firm of Blackstone & Turner, or one of them acting for both, originated and caused to be put into effect a plan whereby application should be made by certain of the Creek Indians for the establishment of a pasture in what was known as the Deep Fork district and the securing of a right for the same, and to that end an organization was formed consisting of 100 of said Indians and the said Pleasant N. Blackstone and Clarence W. Turner. The said organization took the name of Pussy, Tiger & Co., Pussy being a prominent Indian and Moty Tiger another. The remaining 98 Indians in said organization were sought out as Indians who would engage to further the proposed plan, and they lived within the confines of the pasture in said Deep Fork district. Pussy lived about 4 miles from the pasture and Tiger lived about 18 miles therefrom.

It was understood and agreed between the parties composing the said association of Pussy, Tiger & Co. that in the event of the pasture being established each of the said 100 Indians would be paid by the said Blackstone & Turner $100 per year, payable quarterly; that the said Blackstone & Turner would pay the tax of 5 cents per acre per year to the Creek Nation of Indians; and that the said firm of Black-

stone & Turner should have and retain any balances of any fund that might accrue from any transfer of a right to others to use the pasture. The said 98 Indians were full bloods and illiterate and, generally speaking, were poor. A number of them had a few cattle which grazed in said neighborhood. The said Indians were not financially able to build any fence and did not contemplate doing so themselves, but relied upon the said Clarence W. Turner to provide for the financing of the proposition.

VII.

In furtherance of said plan for a pasture, application was made by Pussy, Tiger & Co. to Jacob Knight, judge of the Deep Fork district, in which the proposed pasture was located, and an election was held in conformity with the said enactment set out in Finding IV. More than 100 citizens of the neighborhood voted at the election, and the result of the election was a defeat of the application for the pasture. When the said result was announced, and upon the same day, Pussy notified the judge that another election was desired, and Pussy, Tiger & Co. filed an application for a second election, and the judge announced to the people that another election would be held on October 11. Some of the voters had left the place when the judge's announcement was made. The people concerned knew where the proposed pasture would be situated, but they were not informed as to what its acreage would be.

52 The said application for a second election was filed on September 30, 1890, and was in words and figures as follows:

COURTHOUSE, DEEP FORK DIST., M. N.,
Sept. 30, 1890.

To the Hon. Jacob Knight, Judge Deep Fork Dist.

SIR: We, the citizens of the Muskogee Nation, do hereby ask you to give us an election to build a pasture in the said district according to the laws of this nation enacted October 6th, 1889.

Boundary line thus to commence: Northwest corner of this district, running south on the Sac and Fox line to the North Fork River, thence down said river twenty-five miles more or less, and thence north to the Deep Fork River, thence west up said river of Deep Fork to the starting point; to be not less than one hundred thousand acres.

PUSSY, TIGER & CO.

The judge of the Deep Fork district entered thereon the following order:

COURTHOUSE, DEEP FORK DIST.,
Sept. 30, 1890.

In compliance *to* the above application, I have this day set October 11, 1890, for an election of pasture, to be held at the courthouse of Deep Fork district, M. N.

JACOB KNIGHT,
*Judge Deep Fork Dist.*

[SEAL.] D. C. WATSON, *Clerk.*

On October 11, 1890, the second election was held and the result thereof declared as follows:

COURTHOUSE, DEEP FORK DIST., M. N.,
October 11, 1890.

Election held this day above dated for a pasture according to the application of Pussy, Tiger & Co., as follows, to wit:

Fifty-nine for and thirty against, and the pasture elected by twenty-nine majority.

Thereby the pasture entitled.

I hereby certify that the above election is just and correct and held according to the laws of the Muskogee Nation.

Given under my hand and signature this day above dated.

JACOB KNIGHT,
*Judge Deep Fork Dist., M. N.*
[SEAL.] D. C. WATSON, *Clerk.*

There were above 300 voters in the said Deep Fork District. The evidence does not show the number of voters living in the neighborhood of said pasture. At the said second election a majority of the Indians in the said association of Pussy, Tiger & Co. voted for the pasture. After the result of the second election was announced a contract was entered into, a copy of which forms Exhibit A to the petition and is in words and figures as follows:

Contract and agreement made and entered into this — day of October, 1890, by and between Jacob Knight, judge of the
53 Deep Fork District, Creek Nation, he being duly authorized in the premises under the act of the national council of October 6, 1889, and Pussy, Tiger and Company, citizens of the Creek Nation:

This contract witnesseth—

That Jacob Knight, judge of the Deep Fork District, Creek Nation, hereby contracts with and licenses Pussy, Tiger & Co., they having complied with all the provisions and requirements of the pasture act of October 6, 1889, precedent to entering into this contract, to inclose a certain pasture in the Deep Fork District, Creek Nation, for—

Beginning at a stone on the boundary line between the Sac and Fox and Creek Nations, two miles more or less southeast of the Sac and Fox Agency, running thence south sixteen miles; thence easterly twenty-five miles; thence northerly sixteen miles; thence westerly twenty-five miles to place of beginning, not less than one hundred thousand acres.

That Pussy, Tiger & Co., on their part, agree to build good and substantial fence of four strands of barbed wire, inclosing the tract of country hereinabove described, and bind ourselves to comply with all the provisions of the act of October 6th, 1889, and which act is made a part of this contract.

JACOB KNIGHT,
*Judge Deep Fork Dist., M. N.*
D. C. WATSON, *Clerk.*
MOTEY TIGER, *Pres.*
JOHN PUSSY, *V. Pres.*
J. S. ROBISON, *Sec'y.* [SEAL.]

## VIII.

At some time prior to the winter of 1890 the said firm of Blackstone & Turner or the said claimant, acting for the firm, made an agreement with a firm known as Daniel Waggoner & Son, who were largely engaged in cattle raising and grazed large numbers of cattle, whereby the said Daniel Waggoner & Son agreed, in consideration of the assignment to them of the right to use and graze their cattle upon the said pasture to pay Blackstone & Turner the sum of $27,500 a year during the term of said contract. At that time the building of the fence had not been commenced, and Daniel Waggoner & Son agreed with Blackstone & Turner that the former would advance $10,000, and they did advance that sum, to be used in the purchase of material with which to build the fence around said pasture. The said sum so advanced was to be a credit on the annual payment of $27,500 which Daniel Waggoner & Son were to pay to Blackstone & Turner, as aforesaid.

After making the said agreement with said Daniel Waggoner & Son the said Turner employed a man named Moore to erect said fence, agreeing to pay him $36 per mile of fence and $2 for each gate erected. Turner furnished the wire and staples, and the posts were cut from the Indian lands. Moore employed men and commenced building the fence early in March, 1891. Before and after the work of building the fence commenced complaints were made by Creek Indians living in the district, and objections to the fence or
54 pasture were made. From the time the fence was commenced and continuing throughout its construction rumors reached the parties engaged in erecting the fence of threats by Indians to destroy the same.

## IX.

On or about the first Monday in June, 1891, a number of Creek Indians, having banded themselves together, proceeded to destroy and did destroy so much of the fence as had been erected and to cut the wire used in the fence. When the fence was destroyed about 60 miles of it had been finished, posts had been erected around the balance, and the wire had been strung on all except about 20 miles of the distance. The cattle of said Daniel Waggoner & Son had at that time been turned in upon the pasture and were grazing thereon. The fence was never rebuilt, and no efforts to rebuild it were made, owing to threats of its destruction if rebuilt.

## X.

As the construction of the fence proceeded, threats of its destruction were made and reached the builders. These threats grew in volume as the work progressed. About a month prior to the cutting of the fence a number of citizens inside the area of the fence requested Treasurer Moore to call upon the principal chief, Perryman, to take steps to prevent the construction of the fence and to inform said principal chief of their purpose to destroy the fence if he did not prevent its erection. Treasurer Moore so informed the principal chief,

who gave no positive assurance as to what his course would be. About the same time Judge Knight wrote to the principal chief inquiring whether the fence was a legal fence or not. Treasurer Moore made one or more visits to the principal chief subsequent to the one above mentioned and notified him that the people in the district intended to destroy the fence. About the last of April or early in May the claimant, Turner, who then resided at Muskogee, received information through his agent of threats that the fence would be destroyed, and he sent for Waggoner & Son. Thereupon the claimant, Turner, and one of the Waggoners, on the 4th day of May, 1891, caused to be filed in the United States court for the first judicial division of the Indian Territory a bill in the name of Daniel Waggoner & Son against L. C. Perryman and Jacob Knight as defendants, praying, among other things, for an injunction against the tearing down or the removal of said fence around said pasture.

A copy of said bill for an injunction and the several orders thereon are attached to the petition herein as Exhibit A-3.

During the latter part of May threats against the fence increased. Notices were placed at different parts of the boundary forbidding its erection. Some days before it was destroyed Indians assembled in the nighttime in the vicinity of the place where the work was being done and by discharging guns and making noises attempted to scare away the workmen. Threats of personal violence to the workmen, some of whom were Indians, were made. Indians representing themselves to be light horsemen told Moore, the fence builder, that the fence would be destroyed. A few days before it was cut, Isparecher, a full-blood Indian, and a leader of the full bloods in the
55 neighborhood of the fence, appeared in person and informed the builder, Moore, through an interpreter, that the Indians would destroy the fence unless he suspended work, which Moore refused to do. On the first Monday in June the Indians divided themselves into three groups, and acting in concert attacked in the daytime the fence on three sides with axes, cutting the posts and the wire, and destroyed the entire fence. Spools of wire and staples had been distributed along the line of the fence preparatory to stringing the wire, and these spools of wire were cut and the staples scattered. Two of the groups engaged in destroying the fence were each composed of about 25 Indians, who came from settlements outside the neighborhood of the fence. These were joined by Indians inside the bounds and by Indians outside of the fence, and more than a hundred engaged in the said destruction. Isparecher, who afterwards became principal chief of the nation, was one of the Indian leaders in the movement to destroy the fence and in its actual destruction. He had a ranch near the boundaries of the fence and grazed several hundred cattle on the lands in question. He lived about 8 miles from said neighborhood. Treasurer Moore also grazed a number of cattle on said lands and lived about 6 miles from the pasture. He was another of the leaders in the said destruction. Fixico, an Indian preacher, who lived in the neighborhood of the fence, was another of the leaders, and except these three, who were the leaders, the evidence does

not show the names of the Indians engaged in the work of destruction.

Prior to the destruction of the fence rumors were circulated among the Indians in said district that money had been used in said elections. Some objections to the fence were on account of the size of the pasture, and other objections were because it was claimed that the common right of pasturage was interfered with. The Indians living within the confines of the fence were full bloods, generally illiterate and poor, and without knowledge of the English language. Some of them had from 15 to 20 head of cattle that ranged on said lands.

The said threats to destroy the fence became and were matter of general notoriety in the Deep Fork District. The parties engaged in building the fence did not apply to the Indian authorities for protection against said threats, and none of said authorities took steps to prevent the destruction of the fence.

## XI.

A day or two before the 1st of April, 1891, the said Moore sent to Moty Tiger $1,250 in amount of warrants or scrip, known as auditor's certificates, and which were a legal tender for taxes in the Creek Nation, to be delivered by said Moty Tiger to the district judge as a quarterly payment on the tax due under the contract of 5 cents per acre. Moty Tiger sent these certificates to the judge, who subsequently reported to Tiger that he had taken them to the national treasurer and that the treasurer would not receive them, and the judge delivered them back to Moty Tiger, from whom he had gotten them. That was the only payment tendered or made on account of the tax for said pasture. A short time thereafter Turner sent to Moty Tiger $2,500 in money to be distributed to the Indian membership of Pussy, Tiger & Co. When the fence was destroyed Blackstone & Turner had expended in and about its building the sum of $12,046.82. They recovered materials valued at $1,968.46, which left a net loss on the fence of $10,078.76. The material for constructing said fence had been purchased from the Turner Hardware Co., which was owned and controlled by the said Clarence W. Turner, and later the firm of Blackstone & Turner became insolvent, and said Turner repaid to Daniel Wagoner & Son the $10,000 advanced by them as aforesaid and which had been used in purchasing the said material from the Turner Hardware Co. Several times thereafter—to wit, in November, 1892, October, 1893, November, 1893, and November, 1894, the said claimant presented his claim to the council of the Creek Nation of Indians for $10,078.16, and payment was refused. At one time the council voted in favor of paying said claim and the resolution was vetoed by Principal Chief Perryman. The council subsequently sustained the veto. A copy from the minute book of the supreme court of the Creek Nation of Indians of an order by that court was introduced in evidence, as follows:

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"Supreme court, November 2, 1896. Court convened; opened with prayer by John Reed. Court continued consideration of the question submited by the Pussy, Tiger Co.; after long and earnest argu-

ments court decided the pasture was legal, having been built in accordance with the law then in existence. Then took up the question submitted by H. C. Reed as to claims on the public domain. Court, in the absence of law governing the public domain, declined to render an opinion and adjourned."

"Nov. 3, court convened, etc."

And at the bottom of the page is the following:

"Supreme Court, Okmulgee, M. N., Nov. 2, 1896. Hon. Roley McIntosh 2d and acting prin. chief, M. N., Sir: We have the honor to acknowledge the receipt of your communication of Oct. 31, submitting the question prepared by the Pussy Tiger Co., to wit: 'Whether the building of the pasture in question was legal under the law then in existence providing for the building of large pastures.'

"In reply we have to say that after careful investigation and earnest consideration the court has decided that the building of the pasture was legal.

"DAVID ANDERSON,
*"Chief Justice.*

"SUE M. ROGERS, *Clk.*"

XII.

In "An act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes," approved May 29, 1908 (35 Stats., 444), it is provided, by section 26 thereof, as follows:

"That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation for the destruction of personal property, and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

57 XIII.

On the 13th day of September, 1910, the claimant filed his said petition in this court, and upon the filing thereof the clerk of the court transmitted a copy of it by mail addressed to the chief of the Creek Nation of Indians, and also sent a copy to the Attorney General of the United States. The rules of the Court of Claims at that time provided that—

"Suits shall be commenced by petition, verified in the manner provided by law, and filed in the office of the clerk, with one extra copy in print or typewriting. The clerk will note thereon the day of filing, and will cause a copy to be forwarded to the Attorney General."

At the time said copy was transmitted M. L. Mott, Esq., held the office of national attorney for the Creek Nation, and he associated with him W. L. Sturdevant, Esq., of St. Louis, Mo. On the 3d day

of October, 1908, the said Sturdevant forwarded a paper addressed to the clerk of this court purporting to be a demurrer to the petition of the claimant, and the same was not filed, but was returned by the clerk with the statement that Mr. Sturdevant not being an attorney of this court the paper signed by him could not be received and filed. Said letter reads as follows:

"I return herewith the demurrer and copy of same inclosed in your letter of October 3, 1908, upon the suggestion of the Assistant Attorney General representing the Government in said cause. He desires me to say that as the United States is joined with the Creek Nation of Indians as defendant the proper procedure is for the attorney or attorneys representing the tribe of Indians, defendant, to confer with the Attorney General before taking action.

"I may add further that neither yourself nor Mr. Mott have been admitted to our bar, and Mr. Mott at least, the authorized attorney for the defendant Indians, should apply for admission in the usual way as prescribed by No. 8 of our rules, a copy of which I inclose you under another cover."

The claimant took the depositions of a number of witnesses, commencing in July, 1909. At the taking of said depositions the said Mott and Sturdevant appeared and cross-examined the witnesses; and later, in September, 1909, the said Mott and Sturdevant examined certain witnesses on behalf of the defendant Indians, and the testimony of all of said witnesses is included in the record.

On the 17th day of August, 1914, a brief of R. C. Allen, national attorney for the Creek Nation of Indians, was filed in the clerk's office of this court, in which, among other things, it was contended that the said jurisdictional act did not grant authority for the bringing of the suit; did not grant authority to make the United States a party or to recover against the United States and the Muskogee (Creek) Nation jointly or severally; and that the court had no jurisdiction over the subject matter of the act.

On the 6th day of January, 1915, the case was called in court and the claimant appeared by counsel, and R. C. Allen, national attorney for the Creek Nation of Indians, appeared for the purposes of his said motion, but the United States did not appear by counsel; and it is here stated at the request of claimant's attorney that at the time of the said appearance in court of R. C. Allen, national at-
58 torney for the Creek Nation of Indians, he was accompanied by the principal chief of the Creek Nation in person. The questions were discussed by counsel, and the claimant's attorney amended his petition by striking out the name of the United States as a party defendant, and the case was submitted to the court. On the next day the claimant's attorney appeared in court and requested that the submission of the day before be set aside, which was done, and that he be allowed to amend his petition, which was allowed. Thereafter, on the 25th day of October, 1915, the said attorney for the Creek Nation filed another brief, in which he appeared specially for the purpose of moving to dismiss the case on the ground that the court was without jurisdiction. On the same date the United States, by its Attorney General, filed a motion to dismiss the case against the

United States for want of jurisdiction. The case was then submitted to the court upon the said motion of the national attorney for the Creek Nation, and without waiving said motions the case was also submitted upon the merits. The United States refused to appear further than to make their motion to dismiss for want of jurisdiction.

*Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

*Opinion.*

CAMPBELL, *Chief Justice,* delivered the opinion of the court:

The jurisdictional act under which this suit is brought is found in chapter 216, 35 Stats., 444, entitled "An act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes," and is section 26 of said act, as follows:

"That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation for the destruction of personal property, and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

One of the first questions presented is whether the United States can be made a party to the suit. The plaintiff sought to make them a party, and they through their Attorney General objected. The United States can not be sued without their consent, and there is nothing in the jurisdictional act authorizing the United States to be sued. We are clearly of the opinion that they can not be made parties in this proceeding. Green v. Menominee Indians, 46 C. Cls., 68; 47 ib., 281; 233 U. S., 558.

Another question is as to whether the Creek Nation has been brought before the court. The jurisdictional act does not prescribe the manner of service upon the nation. The rules of the Court of Claims are not adapted to suits against others than the
59 United States and the statute provides that in suits against the United States a copy of the petition shall be served upon the Attorney General, who shall appear and defend. As a matter of fact, when the petition in this case was filed a copy of it was mailed to the principal chief of the Creek Nation. No application was made by the plaintiff to the court to prescribe any service.

It may be noted that said chapter 216, 35 Stats., 444, contains several sections referring to this court, with the right to hear and determine certain claims. Section 5 refers a claim against the

Choctaw Nation and prescribes that notice of the suit shall be served on the governor of that nation, and that the Attorney General of the United States shall appear and defend on behalf of said nation. Section 2 refers the claim which was considered in the case of Green v. Menominee Indians, supra. That section provided that the Menominee Indians, through its business committee, were authorized to employ an attorney to defend in said action, and the Attorney General of the United States filed a demurrer on behalf of the defendants. Section 16 of said chapter refers a claim against certain Choctaw and Chickasaw freedmen to the court, prescribes the method of service of a petition, and authorizes an appearance by an attorney to be employed by the freedmen. Section 27 refers a claim against the Choctaw Nation and prescribes the method of serving the petition. It thus appears that as to claims referred in said chapter there is provision for service upon the defendants, or appearance by them, except in the case under consideration, and it is usual where suits have been authorized by Congress against nations or tribes of Indians that the method of bringing them before the court has been prescribed by the acts authorizing the suits.

The method of bringing a defendant who is sued before a court is a matter of statutory regulation. The Creek Nation was at the time of the action complained of in this case vested with certain powers of government over the Indians composing it, but the Court of Claims can not know upon whom service of process should be executed to bring the nation properly before the court unless the act of Congress prescribes the service that is necessary. Congress may do this, as it may authorize a suit in the exercise of its plenary power of control over Indian affairs. Having failed to do so, we think that the jurisdictional act is defective unless the appearance made by the attorney for the nation is sufficient to bring the defendant into court.

Finding XIII shows what transpired in this court with reference to an appearance by the defendant. Prior to any actual appearance testimony had been taken on both sides, and it was printed by leave of court. No question of jurisdiction or service was raised until after this testimony had been taken and printed. The attorney who took the testimony representing the Choctaw Nation was the regularly employed attorney of said nation under contract authorized by its national council and approved by the Secretary of the Interior. Amony his other duties was that of appearing in all courts at the request of the principal chief to defend said nation. The actual appearance in court by the filing of any pleading or brief occurred after the taking of the testimony, and at that time the question of the court's jurisdiction was raised. We thus state
60 the question, but it is not our purpose at this time to decide it because the case was submitted upon said motion and without waiving it upon the merits, and we prefer to rest our decision upon the latter phase of the case.

The jurisdictional act does not create or declare any liability against the Creek Nation in favor of the plaintiff. Its purport is to furnish a forum where the question of liability may be determined.

Green v. Menominee Indians, supra. The act authirizes the court to "adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner" against the Creek Nation for certain things therein set out. The reference to the destruction of property and loss of pasture by the action of the responsible Creek authorities, or with their cognizance and acquiescence, is merely descriptive of the claim and does not show a purpose on the part of Congress to declare that there is a liability therefor because in a preceding part of the act the court is directed to "render judgment as law and equity may require."

The plaintiff claims that Pussy, Tiger & Co. made a contract with Jacob Knight, judge of the fifth judicial district of the Muskogee Nation, by virtue of which the plaintiff became entitled to a large pasture and that he subsequently granted the right to Waggoner & Son to graze their cattle upon said pasture for a large consideration, namely, $27,500 per year; that while plaintiff was building the fence around said pasture the same was utterly destroyed by Indians, and that he lost not only in large part the material and labor expended in building so much of the fence as had been completed but also the profits he would have made under the contract with Waggoner & Son. He claims several other items, which will be mentioned, and contends that his right of action is for a breach of contract. The findings show that the plaintiff had agreed to pay $10,000 per year to the Indian members of Pussy, Tiger & Co., who were Creek citizens; also that he was to pay 5 cents per acre per year for land in the said pasture, and that he was building the fence required to inclose it. The contract alleged to have been made between Judge Knight and Pussy, Tiger & Co. appears to have been made in October, 1890. In April, 1891, the plaintiff sent $2,500 to Moty Tiger to be distributed among said Indians as the first quarterly payment upon the sum agreed to be paid to them. About the 1st of April he sent $1,250 in scrip, a legal tender for taxes and due to the Creek Nation, to Moty Tiger to be paid upon the tax of 5 cents per acre upon said pasture. This sum was not received by the authorities and was returned to Moty Tiger, plaintiff's agent. At the time the fence was destroyed something over $12,000 had been expended by plaintiff in and about the fence incident to its building.

The plaintiff contends and requests the court to find that he lost the difference between the amount which Waggoner & Son had agreed to pay for the use of the pasture for 3 years ($82,500) and the amount which he was to pay during said 3 years as tax to the Creek Nation at 5 cents per acre, which he fixes at $5,000 per year, or $15,000 in all. Under no phase of the case could this result follow, because if it be assumed that there was a valid contract and a breach of it for which the nation should be held responsible, it is difficult to understand from the contract how there could be any such
61 profit. The alleged contract provided that the owner of the pasture should pay 5 cents per acre per year, and the number of acres in the pasture was 256,000, according to the description in the contract, the tax on which would be $12,800 per year; so that if we assume that Waggoner & Son were to pay $82,500 for the term

there must be deducted from that sum the tax which plaintiff should have paid for 3 years ($38,400), and in addition $30,000 which he would have paid to the said Indians for said time, making an aggregate of $68,400. Besides this, before he could get any profits there should be deducted the cost and expense of building the fence, and upon it he had expended something over $12,000 at the time of its destruction, and something more than three-fourths of it had been completed. It thus appears that the sum of these expenditures would aggregate at least $80,400, and as the facts do not show what it would have cost to complete the fence it is manifest that the plaintiff shows no loss of profits. Of course, if his payment on account of tax had been based upon an acreage of 100,000 acres instead of 256,000 there would have been a difference in his favor. Upon what theory the plaintiff can maintain that the tax he was to pay amounted to $5,000 per year instead of the amount required by the law and the plain terms of the contract is not apparent. The contract provided for a pasture 25 by 16 miles in extent, comprising 400 square miles, and the plaintiff's agent was building a fence to inclose that area, having completed about 60 miles in length of it, with about 20 miles unfinished at the time it was cut. By reference to the bill in equity shown in the findings to have been brought at the instance of plaintiff in the name of Waggoner & Son in the United States court for the Indian Territory against the principal chief and the said judge, night, as defendants to restrain them from taking action to remove the fence, the averments are made that the acreage was 250,000, more or less, and that the tax on that acreage had been paid. The averment as to the payment of tax was erroneous, for it had not been paid, but the averment as to acreage is nearer true. Certainly the plaintiff must be held to have known that the tax he was to pay was 5 cents per acre per year on the acreage described in the contract upon which he relies.

The plaintiff also claims the $2,500 which he paid to said Indians, but that is not recoverable if he could otherwise recover because that sum was paid to the Indians under the arrangement between him and them above adverted to and not under the contract upon which he sues. The item of tax which he claims of $1,250 would not be recoverable for the reason that the nation never received it.

As above stated, he had expended something over $12,000 in and about the construction of the fence, and he recovered about $2,000 in value of the materials after the fence had been cut, making a net loss to him of $10,078.16. Several times he applied to the Indian nation to reimburse him, and on each occasion he made claim for said sum of $10,078.16. That sum appears, approximately at least, to have been the limit of his loss.

The plaintiff predicates his rights under the alleged contract upon the effect of an enactment of the Creek National Council passed in October, 1889, and set out in Finding IV. It is apparent from
62 reading this enactment that one of its purposes was to curtail the practice of building large pastures "to the detriment of the general welfare of the nation." The act provides for the removal of certain large pastures greater in extent than 1 mile square. It is,

however, provided that "where extensive pastures greater in extent than 1 square mile can be located on the borders of the nation to the benefit of any neighborhood by affording protection against the influx of stock from adjoining nations the same may be located" under the conditions mentioned in the act. The persons who may secure these "protective pastures" are "citizens of the district," and an election by the voters in the neighborhood concerned is required. The reason for limiting the right to acquire pastures to "citizens" is manifest; the parties would then be subject to the laws and courts of the nation; whereas if outside parties were allowed to acquire pastures a different result could follow. Blackstone and Turner, desiring to secure a pasture, originated and put into effect a plan whereby about 100 full-blood Indians in the territory affected by the pasture would be brought into an association and an application be made under said act for an election to authorize the pasture and the Indian members of the association would constitute voters to pass upon the question. An election was ordered and the pasture was defeated. A second election was held and the result declared in favor of the pasture. Thereafter the contract in question was made. Several years after the grievances complained of by the plaintiff the supreme court of the nation decided that "the pasture was legal, having been built in accordance with the law then in existence." (Finding XI.) We do not know what facts were before that court, but upon the facts before us we should hesitate to say that "the pasture was legal." The application for the second election was made by Pussy, Tiger & Co., the leading spirits in which were Turner and Blackstone, who were not Creek citizens, and Pussy and Tiger, who were citizens. The petition vaguely referred to the size of the pasture and less carefully expressed its bounds than is stated in the contract subsequently made. The said enactment does not prescribe the form of proceedings necessary to secure the pasture. It provided that application shall be made by "citizens." The application for the pasture in question was made by Pussy, Tiger & Co., not all of whom were citizens. In a number of States provision is made for the establishment of fence districts, and where the statute provides that the application shall be made by freeholders residing in the district it is held that the petition must show that the applicants are freeholders residing in the district, and that otherwise the court receiving the application does not acquire jurisdiction. Flowers v. Grant, 129 Ala., 275; Mize v. Speight, 82 Ga., 397; Cain v. Davie County Commissioners, 86 N. C., 8. We think that it would be too exacting to test the petition of Pussy, Tiger & Co. by any strict rules of pleading. However, the findings show that the Indians who voted upon the question, being Indians in the "neighborhood" affected, were illiterate and poor and were brought into said association because they would undertake to carry out the purposes of its promoters. The plan under which Pussy, Tiger & Co. was organized contemplated that the said Indians should be paid each $100 per year during the term of the contract in the event the pasture
63 were established; and subsequently, in April, 1891, Turner paid to Moty Tiger $2,500 to be distributed among said In-

dians. At the said election a majority of the membership of Pussy, Tiger & Co. voted, and the affirmative vote was 57. It is therefore apparent that those by whose votes the election was carried were pecuniarily interested in the result and became the recipients of money advanced by Turner.

The size of the pasture suggested in the petition as "not less than 100,000 acres" was misleading in view of the fact that the acreage actually covered by the contract was an area 25 by 16 miles, making 400 square miles of land and comprising 2½ times the area suggested in the petition. The facts do not show that that amount of acreage was necessary or proper to constitute the "protective" fence contemplated by said act, nor do we think that the method of acquiring the pasture was in keeping with the spirit and purpose of said act. Thereafter the contract in question was made, but as some of the membership of Pussy, Tiger & Co. were not citizens the question is whether any right can grow out of the contract authorized, as above stated, and made.

Said statute of the Creek Nation plainly contemplates that any contract made under its provisions should be with citizens of that nation. We can not sanction the obtaining of its benefits by indirection. Unless all of the members of Pussy, Tiger & Co. were citizens the purposes and intent of the act were violated. Besides this, section 2116, Revised Statutes, forbids a contract whereby a noncitizen of said nation could make and secure a lease of said pasture or "any title or claim thereto." Said section declares that a contract, such as the facts show the one under consideration to be, shall have no validity. 18 Op. Att'y Gen., 235; Cehrokee Strip Live Stock Asso. v. Cass Land Co., 133 Mo. 394. It is a general rule that no right of action can grow out of a contract made in violation of the terms of a statute or the policy of the law. Harris v. Runnels, 12 How., 79, 82, Burbank v. Conrad, 96 U. S., 291, 302; Harriman v. No. Securities Co., 197 U. S., 244, 298. The alleged contract was not authorized by the law of the Creek Nation. Manifestly the plaintiff can not recover upon it.

The act under which the plaintiff claims provided that there should be a tax upon the holder of the pasture of not less than 5 cents per acre per year, and that act was by express reference carried into the said contract made between Pussy, Tiger & Co. and Jacob Knight, judge of the Deep Fork district. It was made by the act the duty of the said judge to collect said tax, "commencing his assessments from the date of contract," and he was required to pay the same into the national treasury quarterly, beginning with the months of January, April, July, and October of each year. No payment of said tax was made or tendered by Pussy, Tiger & Co. until about the 1st of April, 1891, although the contract was made in October, 1890. The only tender which they actually made was $1,250 in scrip or certificates of said nation, a legal tender for taxes and dues, and this tender was made through Moty Tiger about the 1st of April, 1891. He delivered the certificates to the said judge, to be delivered by him to the treasurer, and the treasurer declined to receive them. They were

thereupon returned by the said judge to Moty Tiger, plain-
64 tiff's agent. The payment of tax due in January had not been made or tendered, nor was the tender made in April sufficient. Instead of paying $1,250 per quarter, there was a liability upon the owners of the pasture to pay 5 cents per acre upon 256,000 acres per year, or a total of $12,800 per year. Their tender therefore should have been $3,200 instead of $1,250, and under the terms of their contract $3,200 should have been paid on or before the 1st of January as well as a similar amount on or before the 1st day of April. The enactment under which they claimed the pasture provided that if "any owner of pasture shall fail to make any quarterly payment or fail to comply with any of the obligation embraced in the contract with the judge, then he shall forfeit all the franchise granted by the terms of his contract, and the district judge shall so declare and enforce such forfeiture." The method of enforcing this forfeiture was a summary one. The owners of the pasture, if any lawful pasture had existed, were in default and their franchise was subject to forfeiture.

From the very beginning complaints were made against the erection of said fence, and plaintiff and his representatives knew of them. Threats of its destruction were made, which grew in intensity until they finally resulted in a large body of Indians getting together and utterly destroying the fence so far as it had been then completed.

The lands sought to be inclosed were part of the public domain of the said Creek Nation, the property being held in community, and the right to graze cattle upon the lands belonged to all of the citizens of the nation. Some of the parties who led in the destruction of the fence lived outside of the neighborhood, but grazed their cattle upon the lands in question.

Plaintiff's petition avers that the damage was inflicted by "a mob of Indians of the Creek or Muskogee Nation or Tribe"; and if that be true the Creek Nation is not to be held responsible for the mob's action. It can be said of the Creek Nation, as was said of the Cherokee Nation, that it has "many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community, and treaties have been made with them in that capacity." Delaware Indians v. Cherokee Nation, 193 U. S., 127, 144. They are not sovereign to the extent that the Federal or State Governments are sovereign, but this suit is predicated upon the assumption that their laws are valid enactments, and it recognizes the separate existence of the Creek Nation. When, therefore, the effort is made to hold them responsible as a nation for the illegal action of a mob we must apply the rule of law applicable to established governments under similar conditions. It is a familiar rule that in the absence of a statute declaring a liability therefor, neither the sovereign nor the governmental subdivisions, such as counties or municipalities, are responsible to the party injured in his person or estate by mob violence. Louisiana v. Mayor, 109 U. S., 285, 287, 291; Hart v. Bridgeport, 11 Fed. Cas., 6149; Gianfortone v. New

Orleans, 61 Fed., 64; City v. Abbagnato, 62 Fed., 240; Murdock Grate Co. v. Commonwealth, 152 Mass., 28, 31.

There is another view which reaches the same result so far as this case is concerned. The three groups of Indians moving with one purpose, and that to destroy the fence, were led severally by Isparecher, a leader among the full bloods, who used and had
65 the right to use lands sought to be inclosed for pasturing his cattle; by National Treasurer Moore, who enjoyed a similar privilege; and by Fixico, who resided in the "neighborhood" of the pasture. The other two leaders were citizens of the Creek Nation but lived some miles from the lands in question. Participating in the act complained of were citizens living within the pasture confines and others living outside of them.

In our view of the question, Waggoner & Son, having turned their cattle in to graze upon said lands, were intruders, and the fence under the facts found was a public nuisance. As such it was liable to abatement. The duty to abate a public nuisance rests primarily on the public authorities, but it is well settled that individuals who suffer special injury therefrom may abate a public nuisance. They do so at their own risk and are liable for any damage done in excess of that necessary to properly abate the nuisance. That the Indians concerned did more damage in and about the entire destruction of the fence and the partial destruction of the plaintiff's materials seems apparent, but for that damage the individuals who did it became jointly and severally liable, and the Creek Nation is not responsible for it.

The plaintiff urges that there was a custom recognized by said nation for noncitizens to acquire pastures through an arrangement with citizens, whereby the latter would acquire the rights and assign or sublet it to a noncitizen. We are dealing, however, with a statute, and the plaintiff claims under that statute. We do not think the custom referred to, if there were such a custom, can be looked to in order to affect the meaning of said statute. The contract which plaintiff sets up was executed about a year after the enactment of the statute, and the time was too short in which to establish any custom contrary to its terms. The case of Wassom v. Willison, 58 S. W., 574, which plaintiff cites, recognizes the validity of a lease made under acts of the Creek Nation amendatory of the said act of 1889, which had been assigned to a non-citizen, to the extent that the due execution of the lease by the proper authorities and its introduction in evidence afforded prima facie proof of its validity and cast upon the defendant the burden of showing that it had not been consented to by the Indians affected. The case also recognizes that proof of the invalidity of the lease might be made and that proof is made in the instant case. Other cases which may be consulted in this connection are Hackett v. Alston, 58 S. W., 675; Cass v. Hall, 46 S. W., 180; Johnson v. Riddle, — U. S., —, decided March 20, 1916.

We do not think that the wrongs complained of show a breach of contract by said nation. Under the facts found any right of action would be for a tort. State of Louisiana v. Mayor, supra; German Bank v. United States, 148 U. S., 573-579.

We have considered the case without intending to commit ourselves

upon the question as to whether or not this court has jurisdiction under the terms of the jurisdictional act of an action for tort. Under the general statute applicable to the Court of Claims it has no jurisdiction of an action sounding in tort.

We conclude that the Creek Nation is not liable to the plaintiff, and his petition must, therefore, be dismissed. And it is so ordered.

Judge Atkinson, Judge Barney, and Judge Booth concur.
Judge Downey took no part in the decision of this case.

66 XI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 10th day of April, A. D., 1916, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the claimant, the said Clarence W. Turner, is not entitled to recover and shall not recover any sum in this action from the defendants, the United States and the Creek Nation of Indians; and that the petition in this cause be dismissed.

BY THE COURT.

67 XII. *Application for and Allowance of Appeal.*

And now comes the complainant Clarence W. Turner, by his counsel of record, and appeals to the Supreme Court of the United States, and applies to the Court of Claims to allow said appeal, from the judgment and decree rendered against him in the above entitled cause, as provided in the Act of Congress approved May 29, 1908, entitled "An Act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes."

KAPPLER & MERILLAT,
*Attorneys for Complainant.*

BUTLER & VALE,
*Of Counsel.*

Filed July 5, 1916.

Allowed, July 7, 1916.

EDWARD K. CAMPBELL,
*Chief Justice.*

68 Court of Claims.

No. 30241.

CLARENCE W. TURNER
vs.
THE UNITED STATES and CREEK NATION OF INDIANS.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and opinion of the court; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 25th day of July, A. D., 1916.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
*Chief Clerk Court of Claims.*

Endorsed on cover: File No. 25,425. Court of Claims. Term No. 595. Clarence W. Turner, appellant, vs. The United States and Creek Nation of Indians. Filed July 29th, 1916. File No. 25,425.

Office Supreme Court, U. S.
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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 33.

CLARENCE W. TURNER, APPELLANT,

vs.

THE UNITED STATES AND THE CREEK NATION OF INDIANS.

## BRIEF ON APPEAL FROM THE COURT OF CLAIMS.

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THE UNITED STATES AND THE CREEK NATION OF INDIANS.

## BRIEF ON APPEAL FROM THE COURT OF CLAIMS.

### Statement of Case.

The jurisdictional act in this case, being section 26 of the act approved May 29, 1908 (35 Stats. 444), provides:

> "That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation for the de-

> struction of personal property, and the value of the loss of the pasture of the said Turner or his associates, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States." (Finding XII rec. p. 34.)

The claim arises out of the fact, as clearly established by the evidence and findings of fact, that Turner had been given through Pussy, Tiger & Company, an organization of Creek Indian citizens having a contract for the same with the Creek Nation, the right to build aa large pasture fence to enclose more than 200,000 acres of land in the Creek Nation. While Turner's men under the arrangement with Pussy, Tiger & Co. were in course of erecting this fence the fence was destroyed by a large number of Creek Indians made up into three bands. One band was led by one Napoleon Moore, at the time of the occurrence holding the office of National Treasurer of the Creek Nation, an office that was second only to the Chief in the executive branch of the Creek Nation. The other two bands of Creek Indians were led by one Isparecher, a leading Creek chief who became soon afterwards the principal Chief of the Creek Nation, and the third band by a Creek Indian preacher (p. 32).

The findings of fact shows that at the time the fence was destroyed there was an actual money loss incurred by claimant Turner in materials and labor of $10,078.76 (p. 33), besides anticipated gains from pasturing of cattle within its borders.

At the time of the destruction the fence was being erected under the provisions of a contract duly entered into pursuant to statute of the Creek Nation (p. 26),

the contract being signed on behalf of the Creek Nation, as provided by the statute, by the Creek District Judge for the district in which the pasture fence was located (p. 30).

About thirty days before the destruction of the fence the United States District Court for the Indian Territory had issued an injunction restraining the principal chief of the Creek Nation and the District Judge, who, pursuant to Creek statute, had executed the contract on behalf of the Creek Nation for construction of the fence, from destroying the fence. The injunction did not proceed against the National Treasurer. The findings of fact are that it was notorious that an attack would be made upon the fence. No steps were taken to prevent destruction of the fence. The National Treasurer visited the principal chief regarding the fence both before and after the action of the court and left with knowledge imparted to him by the chief that the principal chief and others would not interfere in the matter, the National Treasurer informing the chief the fence would be destroyed.

The Court of Claims dismissed the case, primarily on the ground that the Creek Nation, in the absence of statute, was not liable for destruction of property by mobs. The contention of the claimant is that in this the court erred. The claimant's contention is that the case is one of breach of contract. That quiet enjoyment of the pasture was a right of claimant and that for interference with this right, the Creek Nation is responsible, especially where, as is evident here, there was the direct attack on the fence by the National Treasurer of the Nation and aid and comfort given to him in his malicious and unlawful purpose by the principal chief

and other officials of the nation. Furthermore, that the liability may be predicated on a failure, with notice and knowledge, to protect the fence from destruction. Also that the jurisdictional act provided for a conditional liability.

The pasture fence that Turner was engaged in erecting at the time of its destruction by National Treasurer Moore and his associates, following visits which Moore and the District Judge had made to the principal chief of the Creek Nation, one Perryman, subsequent to the injunction issued by the United States Court, was built under a Creek statute that was designed to secure to the Creek Nation as a whole a certain amount of money, 5 cents per acre (p. 27), as the result of grazing cattle upon the lands, in the form of a national grazing fence tax, and at the same time to enable residents of particular neighborhoods of the Creek Nation to raise revenues for themselves by means of the grazing, within pasture fence limits, of outside cattle upon a fair consideration. The Creeks themselves were land poor, had few cattle and were unable with their few cattle to eat up the available grass (p. 33).

For years there ha dbeen a condition of affairs under which a few Creeks monopolized the grazing lands of the Creek Nation to the injury of the Creeks in general, and, where this was not the case, the Creeks suffered grievous loss by reason of outside cattle coming on their lands and eating up their range without payment of anything to the Creeks (26).

This history of the legislation the court is entitled to notice, under its opinion in the case of the New York Indians, 176 U. S. 1.

The Creeks held their lands not by ordinary Indian title. Their title was one by right of purchase and their

deed from the United States government was a title in fee simple.

By Article 3 of the Creek treaty of Feb. 14, 1833 (7 Stats. 417), it was provided:

> "Article 3. The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the lands assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to keep the country hereby assigned them."

By the Creek treaty proclaimed August 28, 1856 (11 Stats. 699), it was provided by Article 15 that so far as compatible with the constitution and laws of the United States regulating Indian intercourse the Creeks "shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits, except, however, all white persons, with their properties, who are not, by adoption or otherwise, members of either the Creek or Seminole tribes; and all persons not being members of either tribes, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents."

By the Creek treaty proclaimed August 11, 1866 (14 Stats. 785), it was provided in Article 10 as follows:

> "The Creeks agreed to such legislation as Congress and the President of the United States may deem necessary for the better administration of

> justice and the protection of the rights of person and property within the Indian territory: provided, however, that such legislation shall not in any manner interfere with or annul their present tribal organizations, rights, laws, privileges, and customs."

The Creeks themselves were tenants in common and each had an undivided interest in all the tribal lands.

Their right to use all these lands for their own purposes, gainful or otherwise, the United States protected by Section 2117, Revised Statutes, reading as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1.00 for each animal of such stock."

Notwithstanding the rights of the Creeks and the laws of the United States there were many attempts to obtain free grass on the part of cattle men, sometimes with the connivance of members of the Creek tribe, were they Indians, freedmen or squaw-men.

The condition of affairs is thus referred to in the report of the Commissioner of Indian Affairs for 1883, Page 89:

> "The Cherokees have collected tax from cattlemen for grazing on lands known as the 'Cherokee Strip,' lying in the northwest corner of the Indian Territory, over $40,000. In June last, at the extra session, the Cherokee council leased the above mentioned lands to a cattle company for a term of five years, at an annual rental of $100,-

000. The company is entirely responsible, and, as they pay the rent six months in advance, the action of the council was certainly wise.

"The unoccupied lands ceded by the Creeks to the United States are covered with cattle, on which tax is paid to no one. The owners of these cattle, and those who refuse to pay taxes to the Indian authorities, are violently opposed to leasing Indian lands for grazing purposes, because, when the lands are leased, those occupying them are compelled to pay for grazing or get out. There is no sense in permitting hundreds of thousands of dollars to burn up every year, or go into the pockets of a few cattle owners, who will not pay a farthing for the feed, when it could be let to the highest bidde rand a large revenue realized."

On March 4, 1884, Secretary of the Interior Teller (Senate Ex. Doc. No. 17, 48th Congress, 2d Session, p. 90) wrote George R. Peck at Topeka, Kansas, as follows:

"I have your letter of the 28th ultimo concerning the leasing of lands in the Indian Territory for grazing purposes.

"You say the right of the Indians to grant grazing facilities has, as I understand, been long recognized in the Department and is sanctioned by various provisions of the Statutes of the United States.

"I understand that a large number of persons have from time to time pastured their herds on the lands of the Indians within the Indian Territory, and cut grass and exercised other privileges with the consent of the Indians without the formal approval of the Department. During the year 1881 sixty-three persons were reported as then occupying some portion of the Indian Terri-

tory for the purposes above indicated. During the year 1882 forty-six persons were reported. All of these persons compensated the Indians for the privileges granted them, although the amounts paid were quite inconsiderable.

"The privilege thus recognized appears to be within both the letter and spirit of section 2117, Revised Statutes, and I do not consider it contrary to the provisions of section 2116 of the Revised Statutes. That section was inserted in the statute for the purpose of protecting the Indian and to make his claim to land, whatever it might be, of value to him. To now invoke the statute to prevent the Indian from allowing grazing privileges in land claimed by him, and thus derive a benefit from his land, *is to use the statute made for his benefit to his injury and hurt.* This is opposed to all canons of interpretation. *It was made for his benefit, and must be construed in his favor when it can be done.* It is to the interest of the Indians that they be allowed to receive from the occupants of their lands a fair price for the privilege of grazing them, and such appears to be the intention of section 2117 of the Revised Statutes."

The same executive document shows that Secretary Teller on Jan. 3d, 1885, addressed the Senate through its President pro tem as follows:

"The right to pasture cattle on the Indian lands with the consent of the Indians has never been doubted until very recently. It cannot be seriously contended by any one that section 2103 of the Revised Statutes is an interdiction to the granting of such grazing privileges. The provision of the statute has no relation to the use or occupation of the lands of the Indians but

refers to contracts made for services to be rendered to the Indians by whites.

"Section 2116 applies to purchases, grant, lease, or other conveyance of lands, but it makes no reference to the products thereof. No prohibition is imposed upon the Indians as to the disposition of the products of the soil. They are not prohibited from disposing of the wheat, corn, or vegetables raised thereon as the fruits of their labor."

The situation with the Indians and their contemporaneous view of their right of self-government in this matter of pasture cattle, and that by their laws, usages and customs they recognized that non-citizens could be lawfully given by citizens of the several Creek neighborhoods the right to pasture cattle, for a consideration, upon the neighborhood Creek lands is shown by a letter dated Tulsa, Indian Territory, Nov. 11, 1890, addressed by Chief Perryman of the Creeks to United States Indian Agent Bennett (file No. 36,074 of the Indian Office files for the year 1890). This letter is further of interest as evidencing the official Creek view of the reason for the pasture fence act under which claimant Turner was erecting the fence involved in controversy here when it was destroyed:

Hon. Leo E. Bennett,
United States Indian Agent,
Muskogee.

Dear Sir:

By reference to your letter of Oct. 29, 1890, referring to Department letter in regard to 100,000 head of cattle belonging to non-citizens grazing on the Creek domain I will say that under

the pasture act of Oct. 3, 1889, certain citizens were granted special privileges of fencing and grazing stock in a portion of the Creek public domain upon a tax on *imported cattle* at the rate of $.05 per acre of the lands so fenced.

The act of Oct. 29, 1890, section 3, reads as follows: Be it enacted, etc., That the citizens of the Creek Nation who have contracts for inclosed pasture exceeding one mile square under the pasture law approved Oct. 3, 1890, *shall be permitted to introduce cattle to be put in* and kept in such inclosed pastures from the 30th day of November to the 15th day of May of each year until the expiration of their existing contracts with the Muskogee Nation.

Under this act it is plainly to be seen that these parties have under such acts special rights to introduce cattle in these authorized pastures. If the 100,000 head of cattle referred to are the cattle located in these pastures unless I find that *non-citizens are locating stock against the wishes of the citizens owning* these pastures it is taken and held by this Office that these citizens have a right under such acts to introduce and hold imported cattle in the pastures so long as they comply with the laws regulating such pastures. Should it refer to cattle located outside of these pastures by non-citizens such stock should be taxed and removed from the limits of the Creek Nation.

Respectfully,
L. C. PERRYMAN, *Chief*.

The situation referred to caused the national council of the Creek Nation, in accordance with its treaty rights, to enact on October 29, 1890, a pasture fence law specially designated to protect the borders of the nation (p. 26). Its purpose was to enable the citizens of neigh-

borhoods to decide whether or not pasture fences were desirable, the act recognizing that such persons as being residents of the vicinity were the ones entitled to the usufruct of the land, after reserving to the nation a small tax.

This act (Rep. 26) declared in its preamble that its purpose was to protect the Creek people as a whole against monopoly by a few and also to afford protection against the influx of large herds from neighboring nations.

The first object it provided for by limiting enclosures to one mile square and specifically gave power to enforce the law as to pasture fences by empowering the judge of the district where a pasture was located to cause the light horse (Indian Police) to take down unlawful fences.

As to the second object the act provided that where pastures greater than one square mile "could be located on the borders of the nation to the benefit of any neighborhood by affording protection against the influx of stock from adjoining nations" the same might be located under certain conditions. Those conditions so far as here material were:

Notice to the Judge of the District "by any number of citizens of the district" that they desired establishment of a protective pasture; due notice to the people of the neighborhood of the time and place when voters should convene and decide whether or not a pasture was needed; a majority vote favoring establishment of a pasture.

These conditions appearing it was made the duty of the judge "to let or grant only the privilege of holding or grazing stock on such lands to such citizen or citizens

as may by contract bind themselves to build a substantial fence of four or more strands of wire and to pay for said grazing privileges an amount per acre per year that shall not be less than $.05."

The location of the tract of land to be occupied was to be designated in the contract. The law provided that the judge should make collection of the stated tax of $.05 per acre, "commencing his assessment from the date of contract." The money he was directed "to pay into the national treasury" on the first day of each quarter and to render to the national council a full report of all moneys collected, together with receipts from the national treasurer (then Napoleon Moore). If any pasture owner failed to make any quarterly payment or comply with any contractural obligations, it was declared that "he shall forfeit all the franchise granted by the terms of his contract, and the district judge shall so declare and enforce such forfeiture."

Subsequent to this act and prior to the location of the pasture in controversy, the evidence shows several instances of location of border fence pastures under arrangement between noncitizens and citizens "that the latter should apply for the right to have a pasture and upon its being granted a non-citizen would use it for pasture and pay the citizens who had secured it.

The claimant Turner followed in the footsteps of these other border protective pastures. He had resided among the Creeks from the early '70s (p. 28). In 1883 he had married the daughter of a Cherokee Indian who had been adopted by the Creeks, raised as a Creek and later given an allotment of land when severalty was provided for in the late '90s.

Turner, under the constitution and laws of the Creek Nation as an intermarried citizen, had a right to the same privileges as regular blood Creek citizens, except that of "participation in the annuities and final participation in the lands"—when distributed in severalty (p. 25). In other words he had all communal tribal rights and privileges.

He was engaged in business and long had as a partner, since deceased, one Blackstone, who was a Cherokee Indian by blood. The Cherokees and Creeks had adjoining territory and under their laws, usages and customs, so long as the land was communal, the citizens of one nation living in the territory of another nation were entitled to enjoy the same rights and privileges as tribal citizens—except that of participation in distribution severally of lands or funds. (McKellop's Edition of Laws of the Muskogee Nation, page 157.) The law gave the Creeks the right and made it the duty of the government to oust intruders. Blackstone & Turner as a firm did business at Muskogee in the Creek Nation for very many years.

Blackstone and Turner made an arrangement with an organization of Creek Indians of what is known as the Deep Fork district in the Creek Nation, this district adjoining the Sac and Fox reservation. The organization took the name of Pussy, Tiger & Co. Ninety-eight of the Indians lived in the Deep Fork district and the organization included those who were favorable to having a pasture in the district. The Indians of the district were poor, had very few cattle and were unable therefore to take advantage of the grass in their neighborhood by grazing their cattle thereon (pp. 28-29).

Certain outsiders, of whom the chief ones were Napo-

leon Moore, then National Treasurer of the Creek Nation, and one Isparecher, a powerful Creek Chief who succeeded Perryman as principal Chief of the Creek Nation, had a number of cattle, not exceeding however more than a few score each, which they grazed in the Deep Fork bottoms free of tax and without compensation to the neighboring Indians (p. 32).

The Indians of the neighborhood having no means of erecting a pasture fence themselves or of pasturing their cattle thereon (p. 33) through their organization went to Blackstone and Turner and proposed that they would apply for and have a pasture fence established under the law on condition that Turner would finance the proposition, build the fence, and that Blackstone and Turner would pay the Creek Nation its tax of $.05 per acre per year and the Indians composing the association $100 per year, payable quarterly (p. 28), or $10,000 annually.

Turner agreed and the Indians duly made application on September 30, 1890, in writing to the Judge of the Deep Fork district to call an election to build a pasture in the district, describing the boundary line (p. 29).

The judge duly set October 11, 1890, for the election and announced the fact to the people of the district.

The election was held on the date set (p. 30) and the judge and the clerk of his court announced that the pasture had been elected by a vote of 59 for the pasture and 30 against, that the pasture was entitled and that the election had been just and correct and held according to the laws of the Creek Nation (p. 30).

Thereafter the judge, pursuant to the statute, entered into a contract between the Creek Nation on one part and the Pussy, Tiger & Co. on the other, providing for

the construction of a fence in accordance with the Creek statute (p. 30).

The statute provided that the pasture fence contracts and rights incident thereto should last for the period of three years, with the privilege of renewal. The claimant Turner acting for the firm of Blackstone & Turner made an agreement with Waggoner & Son (p. 31), large cattle raisers of Texas, whereby the right of grazing within the pasture fence was let to Wagoner and Son for $27,500 a year. Turner employed a fence builder named Moore and commenced enclosing the lands early in March, 1891. Threats to destroy the fence began immediately and grew as the work progressed. The principal leader of the disaffection was National Treasurer Moore, who lived outside the Deep Fork district but grazed cattle within the neighborhood (p. 31). He notified Principal Chief Perryman of the purpose of himself and others to destroy the fence if Perryman did not prevent its erection. Perryman did not indicate positively what his course would be. Either at this time or later teh district judge, Knight, wrote to Perryman inquiring whether the fence was a legal fence or not. Knight was the district judge in whom under statute was vested the power of holding the election for the fence and let a contract for erection thereof, and who had as he certified found a lawful majority for the fence and thereafter had let the contract or lease here in controversy.

The threats grew and the fence was interfered with and accordingly Turner sent for Waggoner. The latter brought suit in the United States District Court for the Indian Territory to enjoin the principal chief and Knight, the district judge, and all persons from tearing

down or removing the fence or interfering or intermeddling with it (pp. 13-15). The bill of complaint alleged among other things that a notice or order had been issued by Perryman to Knight to destroy and remove the fence. The court issued a rule to show cause on Perryman and Knight why they and their agents and servants should not be forbidden to suffer or commit any interference with the fence, including therein cutting down or damaging the wire (p. 17). This order was issued May 4, 1891, and was made returnable on May 7, 1891.

Attorneys for Perryman and Knight entered their appearance and on May 11, 1891, the court issued a preliminary injunction against Perryman and Knight, "their clerks, attorneys, agents, servants and workmen," from interfering or meddling with any of the rights, privileges and franchises granted to Pussy, Tiger & Co. and passing to the complainants by lease (p. 19).

The Court of Claims has found that at this period Knight wrote the principal chief inquiring whether the fence was a legal fence or not and that National Treasurer Moore visited the chief and gave him notice the fence would be destroyed. The statute made it the duty of the district judge Knight to make collection of the national tax and *to make assessments therefor,* with power to declare and enforce a forfeiture on failure to comply with obligations. The collections he was to turn over to the national treasurer (pp. 27-28) whose duty merely was "to receive and receipt for all national funds and to disburse the same, as should be provided for by law" (p. 25). The judge was vested with direction of the light-horsemen of the district (p. 25). These light-horsemen had police powers. The threats increased during May. Notices were placed at different places

forbidding erection of the fence and assemblages of the Indians during the night discharged guns and attempted to scare the workmen away. Threats of personal violence were made against the workmen and light-horsemen informed the fence builder that the fence would be destroyed (p. 32). Isparecher, a leading chief who lived outside the district but raised some cattle within the district, informed the builder the Indians would destroy the fence unless he suspended work, which the builder, Moore, refused to do.

The threats of destruction were a matter of general notoriety in the Deep Fork district. The authorities took no steps whatsoever to prevent destruction and Moore, contrary to his official duty, refused to receive payment from Knight, which was made to him for taxes (p. 33). Knight's ultimate assessment would depend upon acreage ascertained after completion of the fence.

Notwithstanding the injunction and notwithstanding their knowledge of conditions none of the Creek authorities took any steps to prevent destruction of the fence (pp. 32-33). Not even advice against such a course was given.

On the first Monday in June Indians moved from settlements outside the district and under the leadership of National Treasurer Moore, Chief Isparecher, and one Fixico destroyed the fence, which up to that time had cost Blackstone and Turner some $12,046.82. They recovered materials valued at $1,968.46, which left a net loss of $10,078.76 (p. 33).

Turner under an arrangement between the parties undertook responsibility for the loss and Turner personally paid back to Waggoner some $10,000 Waggoner had advanced on his grazing contract (p. 33).

On a number of occasions Turner presented his claim to the Creek National Council. In accordance with Creek law the matter as to whether the fence was legal or not was submitted by the acting principal chief of the Creek Nation to the Creek Supreme Court (p. 33) to decide the question: "whether the building of the pasture in question was legal under the law then in existence providing for the building of large pastures."

The Creek Supreme Court decided "that the building of the pasture was legal" (p. 34). The Creek National Council voted to pay Turner for his net loss on the fence of $10,078.76, but the resolution was vetoed (p. 33) by Principal Chief Perryman, the same chief who had been in power when the destruction occurred.

Turner presented his claim to Congress and Congress passed the jurisdictional act here in question.

This jurisdictional act, which included many items in one omnibus Indian Bill, did not make any provision as to service and state how the parties should be got in court but did confer jurisdiction over the subject matter and the parties upon the court. The claimant filed his petition in court. The Creek Nation at this time had not yet gone out of existence, but was represented only by a principal Chief and a National Attorney, whose contract had been approved by the Secretary of the Interior, as required by law. The United States was custodian of the Creek funds and occupies a quasi trust relation to the Creek Indians and because of this the United States was made a party to the suit, no relief being asked against it personally.

The Court of Claims rules at this time provided for service on the United States by transmission of copy of the petition an dthe Attorney General. It had no rules

governing service on parties other than the United States, but the Clerk forwarded a copy of the petition to the Creek National Attorney, who associated an assistant or associate attorney wtih him in the case, and also a copy to the United States.

This associate attorney forwarded to the clerk of the court a demurrer to the petition, the ground of demurrer being that the Creek Nation was not liable for the acts of a mob.

The Clerk of the Court of Claims at the suggestion of the government counsel returned the demurrer with the statement that the attorney would have to be admitted to practice in the court before his demurrer could be filed and suggested conference with the Attorney General.

Under the rules and practice of the Court of Claims it is not usual for pleadings of any sort to be filed in a case brought by a claimant before testimony taken. The usual practice is simply to file formal denial of the claim after all testimony is in.

During the summer following the filing of the petition testimony was taken on both sides, the claimant producing a number of witnesses who were cross-examined by the National Attorney for the Creek Nation, the principal Chief of the Creeks being present. The Creek attorneys on their part put on a number of witnesses who were duly examined and cross-examined. (p. 37)

Brief was filed by the claimant, and thereafter by the National Attorney for the Creek Nation, one Allen, who succeeded the former National Attorney, one Mott. The new National Attorney for the Creeks in this brief contended that the court had no jurisdiction. The United States filed a motion to dismiss for want of jurisdiction

and the Creek Nation Attorney on the same day filed a similar motion. The case went to hearing on the merits. The court found against the claimant and dismissed his petition, the court rendering a written opinion. From the judgment or decree of dismissal the present appeal is taken.

## Assignments of Error.

The appellant (Claimant below) for assignment of error states that the Court of Claims erred as follows:

1. In dismissing the claimant's petition and holding that Claimant is not entitled to recover any amount.

2. In holding that if entitled to recover at all claimant's recovery is limited simply to the amount of the net loss of the materials and abor entering into construction of the fence.

3. In finding at the conclusion of Finding of Fact No. X that the parties engaged in building the fence did not apply to the Indian authorities for protection, said finding on the face of the record being contrary to the finding in said Finding of Fact No. X that a bill for an injunction was served on said Indian authorities and a temporary injunction against them was outstanding when the fence was destroyed.

4. In holding that the pasture under course of enclosure was not a legal pasture.

5. In not finding and holding that the claimant Turner and his deceased partner Blackstone were each and both entitle dunder the law to all the rights and privileges of Creek citizens.

6. In holding that under the contract in question the claimant or his assignors were in default in advance of the assessment of the amount due.

7. In holding that the pasture involved herein was subject to forfeiture.

8. In holding that the pasture involved herein was a public nuisance and subject to abatement by the Indians.

9. In holding that the destruction of the fence was not a breach of contract by the Creek Nation.

10. In holding that claimant, under the circumstances of this case, has no right of action against the Creek Nation in the absence of a statute making the Creek Nation liable for destruction of property by a mob.

11. In finding that by the jurisdictional act Congress merely ha ddescribed the claim and had not made a basis for liability if the facts referred to in the jurisdictional act were established.

## ARGUMENT.

Summarized briefly on the indisputable facts the record is that of a contract duly entered into pursuant to its own statutes by the Creek Nation through its duly accredited representatives and a finding by the judicial authorities of the Creek Nation, and of the United States court so far as the matter therein proceeded, that the contract was a valid contract lawfully entered into; an obligation arising out of said contract as a necessarily implied incident thereto for peaceful, undisturbed possession of the premises leased and protection against interference by the Creek Nation, its officials and citizens with construction

of the fence; an interference with the contract and possession thereunder by principal officials of the Creek Nation and the forcible breach of the contract, this duress beginning with threats in which the national treasurer and the light horse or national police took part and continuing to the point of actual violence; the threatened destruction of the fence one of general notoriety for some space of time and specifically by suit brought to the notice of the chief authorities of the Creek Nation, the Principal Chief and the District Judge, both vested with power of protection and both neither givnig peaceful advice to other officers of the Creek Nation who announced their purpose to destroy the fence and break the contract nor moving in the slightest at any time to assure to the contracting lessees the rights due them under the contract; destruction of the fénce under leadership of the National Treasurer, official party to administration of the contract, and, at last, jurisdiction conferred on the courts to administer a remedy for wrongs done.

Claimant contends:

1. That by the jurisdictional act Congress, which had reports before it from the Eecutive departments showing destruction of the fence and the contract for the fence, plainly manifested a purpose that the Creek Nation should respond in such damages as law and equity required, provided the injury done were brought home to responsible authorities of the Creek Nation directly, or their cognizance of or acquiscence in the violence were established under conditions that made it in law and equity a wrong to be remedied by the Nation.

2. That under a narrower view the Creek Nation is liable for breach of contract and failure of duty neces-

sarily arising out of its contractual obligations, those obligations (Congress having provided a remedy and removed the bar of the statute of limitations) being measurable by the same rules that the law would impose had a private corporation been owner of the lands and party to the same contract, and its members and officials party to the destruction.

Counsel deem one or other or both of these the determining points in the case, though they will in their brief notice other points of alleged defense advanced by the Court of Claims or defendant, and not deemed material by claimant.

Congress having the claim before it, and having plenary power in the premises (Lone Wolf vs. Hitchcock, 187 U. S. 553; Cherokee Nation vs. Hitchcock 187 U. S. 294, and Stephens vs. Cherokee National 174 U. S. 445) laid down in the jurisdictional act, as claimant contends, certain principles on which the Creek Nation should be liable to claimant for the loss he had suffered, it being conceded he had suffered substantial pecuniary loss.

The Creek Nation was a sovereignty under the supervisory control of the United States. It was therefore proper that Congress should declare the conditions on which, if proved, this Indian nation should be liable, just as the President and the Secretary of State and Congress have done where foreign interests and countries are involved.

Accordingly, Congress referred the case to the judiciary to do what law and equity, in other words justice, required in the event the claimant's loss was the consequence either of the "action of any of the responsible Creek authorities," or was "with their cognizance and

acquiescence." In other words, Congress made the Creek Nation, which could act only through its responsbile officers, liable in the event the overt acts of those officers themselves, or their supineness, occasioned the loss—on the theory that the nation should be liable for the acts of commission of disorder of its authorities or the deliberate omission, with notice, to maintain law and order of the tribal authorities where injury was occasioned thereby.

It is a rule of statutory construction that effect shall be given to every word of a statute if possible; that if the legistaure in an act has employed language not ordinarily used in a statute it shall be deemed to have so departed with and for a purpose, the ascertainment of which purpose and intention is for the court, as its chief function in construing the statute. That intention counsel submit is that above set forth.

The court below, which both in its findings of fact and its opinion has shown its purpose to state the case against claimant in the strongest possible way, in its opinion holds that the words quoted heretofore are "merely descriptive of the claim and does not show a purpose on the part of Congress to declare that there is a liability therefor because in a preceding part of the act the court is directed to 'render judgment as law and equity may require.' " In this it is submitted the court is in error. The words in no sense describe the claim, are surplusage and meaningless if their purpose was to identify the claim.

The purpose and intent of Congress in adopting the phraseology used will appear from an examination of international law and of the statutes and decisions of our States. The Creek Nation being a quasi sovereignty,

Congress was applying to it the grounds on which this country claims liability for our citizens from other countries, and concedes reparation to foreigners injured by violence.

Thus in a case arising out of the lynching of eleven Italians, March 14, 1891, at New Orleans, who were suspected of concern in the murder of the chief of police at the instance of the Mafia, Secretary Blaine, April 14, 1891 (Moore's International Law, p. 839), said:

> "If, therefore, it should appear that among those killed by a mob at New Orleans there were some Italian subjects who were obeying the laws of the U. S. and of Louisiana, 'and that the public officers charged with the duty of protecting life and property in that city *connived at the work of the mob, or upon proper notice or information of the threatened danger, failed to take any steps for the preservation of the public peace*, the President would, under the circumstances, feel that a case was established that should be submitted to the consideration of Congress with a view to the relief of the families of the Italian subjects who had lost their lives by lawless violence.' "

Secretary of State Fish to Mr. Partridge, minister to Brazil, March 5, 1875 (Moore's International Law Digest, p. 816):

> "It is the duty of Brazil when she receives the citizens of a friendly state to protect the property which they carry with them or may acquire there. If persons in the service of that Government connive at or instigate a riot, for the purpose of depriving a citizen of the United States of his property, the Imperial Government must be held accountable therefor."

Secretary Evarts to Mr. Welsh, minister to England (Foreign Relations for 1880, p. 538):

> "With reference to the claims of the American fishermen whose nets were torn up and who were driven from Fortune Bay, in Newfoundland, by a mob of natives, if I am correct in the views hitherto expressed, it follows that the United States Government must consider the United States fishermen as engaged in a lawful industry from which they were driven by lawless violence at great loss and damage to them; and that as this was in violation of rights guaranteed by treaty they have reasonable ground to expect at the hands of Her Britanic Majesty's Government, proper compensation for the loss they have sustained."

Similarly the Book of Foreign Relations for 1881 (p. 590) shows 15,000 pounds paid to American citizens "in full satisfaction of all claims for disturbances of American fishermen in their fishing operations on the coast of Newfoundland and its dependencies," for the violent interference with their lawful rights of fishery.

The question may be raised why was not suit brought against the individuals composing the mob. The answer is two-fold. First, it was within the plenary power of Congress to make the Nation liable and Congress has so done and the Nation as a contracting party should respond. Second, recovery could not have been effected against the individuals, because their rights in the Creek land were communal and exempt, as were their improvements, and the personal property available for a judgment was negligible.

In County of Allegheny vs. Gibson, 90 Pa. St. 397, the court upheld a statute declaring liability for damage

sustained by riot where the county had notice or knowledge of threatened destruction of property and did not protect. It said that the statute was both remedial and penal and held: *Notice is not necessary where the authorities have knowledge* of the intention or attempt to destroy property."

See also Solomon vs. City of Kingston, 31 N. Y. 565.

That such liability is not new but was part of the common law was held in the course of the opniion in Spring Valley Coal Co. vs. City of Spring Valley, 65 Ill. App. 571, wherein the court said:

> "That unlawful and riotous mobs, and the violence usually attendant thereon, might be discountenanced by the people at large, it is by this law made a matter of interest to property owners and taxpayers, to give their moral support to the enforcement of law and order, experience having frequently shown that people not directly interested in the strike, nor in the riotous proceedings of those engaged in an unlawful attempt to accomplish their ends by violence have, neverhteless, tacitly given their sanction and support to the mob, when had they used their influence in favor of law and good government, and been willing to assist the constituted authorities in suppressing the riot, the more serious consequences would have been avoided. No doubt consideration of this nature induced the legislature to pass the law in question. In the older States and in England, such laws have been in force for many years. Indeed as early as the reign of Edward I. of England, according to Blackstone, when the Kingdom was divided into hundreds, a forfeiture was, by the statute of Winchester, imposed upon the hundred wherein a man was robbed, which was meant to oblige the hundreds to make hue and

> cry after the felon; and if they took him, they stood excused; but otherwise the party robbed was entitled to prosecute them by a special action on the case for damages, equivalent to his loss."

In Darlington vs. Mayor of New York, 31 N. Y. 164, which was a case similar to this, Chief Justice Denio, speaking for the court, says:

> "Laws of this general character have existed in England from the earliest period. . . . These provisions are referred to to show that the action in question is based on a policy which is coeval with the laws of England, and one which has been constantly acted on in that country, and hence that it very clearly falls within the general powers of the legislature. . . . We do not think the constitutional question sought to be raised can be regarded as fairly debatable."

Luke vs. City of Brooklyn, 43 Barbour (N. Y.), 54:

> "The act under which this action is brought, declares that 'when any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by and in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof.' . . .
>
> "The principal question raised upon the appeal in this action is upon the force and validaiity of the act referred to, and the constitutional power of the legislature to pass the law. If any rule of legislative authority may be regarded as settled and established in the courts of this State, it is that which declares that the power of the legislature is supreme in all respects, and unlimited in all matters pertaining to legitimate legislation, except when it is limited and restrained by the fun-

damental law. . . . The duty and obligation of the State to provide for the safety of property against the destructive violence of mobs of lawless and riotous men, is too plain for question, and the supplemental obligation imposed upon cities and counties to provide compensation for the injury or destruction of property which they could not or would not prevent, is but another application of the same principle of public duty."

Sarles vs. Mayor of N. Y., 47 Barbour, 451:

> "The plain object of the law was to compensate such unfortunate persons as should without fault on their part suffer by the violence of mobs. It is the duty of the State to provide protection to property from lawless violence."

See also Ely vs. Niagara, 36 N. Y. 167.

It is submitted that the terms of the jurisdictional act are inconsistent with any theory that the words used were inserted merely as descriptive of the claim. The injury had long since been done claimant and Congress, dealing retrospectively, used apt words to make the nation liable if it, acting as it could as a nation only through its authorities was at fault actively or by cognizance, acquiescence and passiveness, whereas it did not desire to declare liability if this semi-civilized and sparsely settled community was, with Turner, the victim of an unexpected mob that had suddenly resorted to precipitate violence—in effect putting into force as applied to this case the statutes of various States.

## TWO.

VIEWED FROM THE NARROWER ANGLE OF LIABILITY FOR BREACH OF CONTRACT THE

CASE IS ONE OF CONTRACT BY THE CREEK NATION, BROKEN BY DIRECT ASSAULT OF SOME OF ITS RESPONSIBLE AUTHORITIES WITH KNOWLEDGE OF ALL THE OTHERS AND ACQUIESCENCE BY THEM IN THE BREACH. THE CREEK NATION'S DUTY WAS TO AFFORD PROTECTION AND QUIET ENJOYMENT OF POSSESSION. IT AFFORDED NONE WHATEVER. IT WAS A PARTY, DIRECT OR TACIT, TO THE DURESS EMPLOYED.

Upon a demise of property the law implies a covenant of quiet enjoyment of possession.

Lutz vs. Linthicum 6 Peters (U. S.) 165-76.

Scott vs. Rutherford 92 U. S. 107-9.

This covenant goes to the possession and not the title.

Bouvier's Dictionary "Quiet Enjoyment."

The Creek Nation by statute prescribed the conditions on which pasture fences should be authorized. It made the Creek district judge the party to call, hold, and declare the validity of eections for pasture fences and to execute contracts for such fences. His determination thereupon became decisive as to the election and his contract the contract of the Creek Nation—at least in the absence of fraud on the part of the judge, as to which there is not in the findings or in the evidence even a suspicion.

Throop on Public Officers, Sec. 772, says:

> "A contract or othe ract made or performed by a public officer expressly or impliedly authorized by law to make or perform the same, binds the government of the State or nation, in like manner

> as a contract made by an individual, through his authorized agent, binds the individual."

By the contract in this case the Creek Nation gave the right to erect a pasture fence and claimant was complying strictly with his part of the contract *when the fence was destroyed.* The Creek Nation's contract was that claimant might erect this fence; it was a necessary incident thereto that its officials would not interfere with the peaceful erection of the fence, and also that its officials would not aid, abet, or connive at a forcible destruction of the fence and prevention of its completion. The Creek Nation's contract was that claimant, for pasturage purposes, should have the possession of the enclosure, and by custom claimant under this and prior acts was entitled to turn cattle other than his own into pasture with consent of the nation; it was a necessary incident to this possession and contract that the officials of the Creek Nation would not interfere by force of arms with this peaceful possession, would not aid or abet others in so interfering and would use at least reasonable means to prevent interference with a possession or priviege it for a consideration had conferred. It had several weeks' notice of the situation. Counsel has referred to claimant as entitled because he lawfully had the rights of Pussy-Tiger & Co.

The National Treasurer of the Nation and the district judge conferred with the principal chief. The first named announced a purpose of destruction of the fence if the chief would not stop construction. Interference with construction of the fence was enjoined by the United States district court so far as the Principal Chief and the district judge were concerned. That injunction was

for the protection of the fence. Observance of its spirit called for active measures to prevent destruction. The National Treasurer again called on the Principal Chief after the injunction, went away and soon thereafter led the parties of fence destroyers. A nod is said to be as good as a wink to a blind horse.

The findings show that the destruction of the pasture fence began in a sense with the refusal of the National Treasurer of the Creek Nation to accept the payment of rental tendered him by the Creek judge and which it was his duty to accept as he had no official duty as to its amount, the Creek judge making the assessment under the law, and his leading a mob instead to destroy the fence. At this time the National Treasurer was the highest officer of the Creek Nation not under injunction. Creek laws made the district judge the official primarily charged with the duty of making the contract and of seeing that its execution was properly carried into force and effect, he having this duty not only as to one but both parties to the contract. It was the duty of the principal chief to protect and so far as lay in his power to prevent interference with the contract rights and privileges of claimant. It was the duty of the light horse not to interfere nor to aid or abet or to permit others to interfere with claiman's enjoyment of the privileges given him by contract with the Creek Nation. All these officials under the proven facts clearly either actively interfered with, or aided and abetted in the interference with claimant's privilege of exclusive use of the Creek border pasture by neglect of their official duties and by tacit permission at the least to the National Treasurer and his associates to proceed.

The Creek Nation having made a contract with the covenants therein expressly or impliedly contained, it was its duty to fulfil and to do whatever was necessary to enable the contract to be performed.

Dermott vs. Jones, 2 Wall., 1.

Acting as it could only through its officers their acts or omissions were those of the nation.

The court below has attempted to step around this contract feature of the case by the statement the case is in tort and not in contract. It is immaterial whether the case is in tort or contract since the measure of duty would be the same in either case, and since it is in the power of Congress to confer such jurisdiction as it chooses on the Court of Claims. But, in law the case is in contract even though it might be treated also as in tort.

Many cases arising out of contract relations may be sued on either as a breach of a contract or as a tort on the same state of facts; Cooley on Torts, second edition, p. 104. Thus in Dean vs. McLean, 48 Vt., 412, it was held one who had contracted for running his logs over a dam and agreed to pay all damages might be sued on the contract or in case. So in Balto. Ry. Co. vs. Kemp., 61 Md., 619, and Nevin vs. Pullman Co., 106 Ill., 222, it was held that a railroad passenger might sue either in contract or in tort.

A party may sue for breach of contract where for a consideration of the benefits to the remaining land, an owner grants a railroad a right of way and the railroad fails to construct and operate the railroad, Eckington Ry. vs. McDevitt, 18 App., D. C., 497, reversed as to the measure of damages only in 191 U. S., 103.

The Creek Nation having entered into a contract and departed from its purely political to enter upon commercial functions it became by law subject to the rules of the general private law as to like contracts—the only distinction being that no remedy existed for its breach of contract until conferred by Congres.s

Chapman vs. State, 104 Calif., 690.

This was an action arising out of the fact that the state, in consideration of wharfage and docking charges, paid to its officers, the State Board of Harbor Commissioners, received upon a public wharf in San Francisco under control of the State Board of Harbor Commissioners a load of coal which fell into the bay and was lost by reason of the failure as alleged of the defendant state, its officers and agents, to keep the wharf in good and sound condition and repair. At this time there was no statute authorizing a suit in court against the state arising either out of a contract or in tort for negligence. But two years later the state gave the right of suit.

It was conceded, or at least held by the court, that the accident occurring after the act was passed there was no right of action against the state for a tort, that is, negligence. The court found, however, that the case was one arising under contract and held that although the act was passed subsequent to the loss of the coal Chapman was entitled to relief, he previously having a right under his contract but no remedy inasmuch as the state could not be sued.

The court said (page 161):

"The case is not founded upon negligence constituting a tort pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract.

"The facts stated in the complaint show that the defendant in consideration of the wharfage paid to it received upon one of its public wharves the coal of plaintiff and to be delivered on such wharf for removal therefrom. The matters alleged in the complaint show a contract and the state is bound thereby to the same extent as a private citizen engaged in conducting a business as a wharfinger would be under a similar contract. The principle that a state is bound by the same rules as an individual in measuring its liability on a contract is well expressed by Justice Allen in People vs. Stephens, 71 New York, 549.

* * * * * * *

"We are entirely satisfied with plaintiff's cause of action as alleged in the complaint arising upon contract, and that the liability of the state accrued at the time of its breach, that is, when the coal was lost through the negligence of the officer in charge of the state's wharf, although there was then no law giving to the plaintiff a right to sue the state thereon. In so far as that act gives the right to sue the state upon its contracts the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts and the act referred to merely gave a remedy and forum for the enforcement of such liability.

"The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him. It only shows that he cannot enforce against the state his claim. What is made out by this objection is not that

there is no liability and no claim but that here is no remedy. Coster vs. Mayor of Albany, 43 N. Y., 407."

Danolds vs. State of New York, 89 N. Y., 36, was a case where the State of New York through its legislature had authorized a board of commissioners to purchase a site and proceed with the erection of a reformatory, the board being charged with the chief superintendency of the work. The board let contracts for the construction of the building and work was well under way when, pursuant to an act of the state legislature, the further performance of the contract was arrested and a superintendent of building was appointed who refused to permit the contractors to complete their contracts.

The contractors brought suit and among the contentions advanced by the state was one that the state was not liable at all, and furthermore that if liable it was not liable for propective profits of the contractors.

The court said (p. 42):

"There is no plausible reason for saying that the building commissioners exceeded their powers in making these contracts. In making them, they did not act for themselves, *but for the state and the state became bound by them,*" * * * "These provisions (of the contracts) do not authorize or contemplate the entire abrogation or repudiation of the contracts on the part of the state and the absolute arrest of the performance thereof." * * * "It will be seen by a careful reading of the contracts that there is nothing in them which authorizes the agents of the state to repudiate them, or to absolutely arrest their performance without liability for damages. The

contracts were binding upon the state; it could refuse to perform them on its part and arrest the performance of them by the contractors, but it could in no way destroy or get rid of the obligation on them. * * *

"It is further claimed that the state cannot, like the individual, be made liable under such contracts for prospective profits. It is conceded that if these contracts had been executed between individuals these prospective profits would have been proper items of damage. But the claim is that the same rule does not apply to the sovereign when it enters into a contract, that it can repudiate its contracts and arrest their performance at any time with liability only for the fair value of the work done and materials furnished and for actual damages, but not for prospective profits. We have given the careful consideration to this claim which its importance demands without being able to give it our assent."

See also Carr vs. State, 22 American State Reports, 626.

In People vs. Stephens, 71 N. Y., 527, the court held:

Where the state comes into court as a party in a controversy with an individual, the intent of the legislature in any action it may have taken in respect to the controversy, may be ascertained, and may be construed in the light of surrounding circumstances.

"The state, in its contracts with individuals, must be judged and must abide by the same rules which govern in similar cases between individuals; and whenever such a contract comes before the courts, the rights and obligations of the contracting parties wil be adjusted *upon the same principles as if both contracting parties were private persons.*"

Judge Allen in his concurring opinion, which has been generally adopted since by the courts of New York and other states, said:

> "There is not one law for the sovereign and another for the subject, but when the sovereign engages in the business or the conduct of business enterprises and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private citizens. Both stand upon equality before the law and the sovereign is merged in the contractor and suitor. The state is not in tutelage as one incapable of acting sui juris, but has capacity to act in all matters by its representatives and agents and is bound by the acts and admissions of its duly appointed and recognized officers and representatives acting within the general scope of their constitutional powers, whether ministerial or executive. In the absence of fraud or collusion the acts of public officers within the limits of authority conferred upon them and within the performance of the duties assigned them in dealing with third persons cannot be repudiated."

U. S. vs. Smith, 94 U. S., 214, was an action brought for damages for improper suspension of the work of a contractor, an army post commander stopping work on buildings and the Secretary of War later allowing the contractor to resume work.

The court by Chief Justice Waite said:

> "In Clark's case, 6 Wall., 546, it was decided that the United States were liable for damages

> resulting *from an improper interference with the work of a contractor;* and in Smoot's case, 15 Wall., 47, that the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party. The same rules were applied to the case of the Amoskeag Company, 17 Wall., 592. Here the work was stopped by order of the United States. Smith asked to be released from his contract, unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, certainly, this would be considered an improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule."

If it be answered that the Creek Nation did not itself stop the fence building the rejoinder is that the responsible officers did and that the nation through its chie. acquiesced.

It is unnecessary to consider whether where by contract for a consideration and after improvements begun a right granted to build or maintain a pasture fence for three years may be lawfully revoked or forfeited because no lawful revocation was attempted. It cannot be revoked by fraud or violence. If the fence were unlawful the Creek district judge had statutory power of forfeiture. The Creek Supreme Court has held the fence was lawful. But going the furthest limits and conceding arguendo only a mistaken view of matters by the contracting parties to the fence lease upon what principle of law can it be said that a quasi sovereignty entering into a contract and granting in fact a right to construct a

fence through its constituted authorities is not liable for the actual money loss suffered through violence committed by some of the chief officials of the sovereignty after notification of their intention to do the violence given to the chief officer of the sovereignty, without rebuke or invocation to lawful methods and where at the time there is pending in a proper judicial tribunal proceedings wherein all rights of all parties may be fully adjudicated. If the state would be liable for negligence in not protecting claimant in the rights it for a consideration has conferred is it not liable under the facts at bar.

THE FOREGOING IT IS SUBMITTED DISPOSE OF ALL PROPER AND PERTINENT ISSUES IN THE CASE. THE EXTRANEOUS ISSUES RAISED BY THE COURT BELOW AS TO THE MERITS OF THE FENCE ELECTION, THE PARTIES TO THE CONTRACT AND CONSTRUCTION OF THE FENCE AND JUDICIAL PROCESS IN THE CAUSE, IF MATERIAL SHOULD HAVE BEEN RULED IN CLAIMANT'S FAVOR.

The learned court below stated both findings of fact and its opinion of the law in the most adverse manner possible to the claimant. Thus, in its findings, for example, it states (p. 32): "Indians representing themselves to be light horsemen told Moore, the fence builder, that the fence would be destroyed," though Moore's testimony was uncontradicted and was that the Indians in question were light horsemen; that they were equipped and carried Winchesters as did light horsemen; and that they informed him they were light horsemen. In not finding Blackstone, an intermarried Creek citizen, the uncontroverted testimony being he was a Cherokee by blood

who had married a deceased Creek. Its statement, contrary to the rules and decisions of this court, that findings in the nature of a special verdict should be made and not portions of testimony, that rumors were circulated that money had been used in the election (p. 33), such not being competent and being a prejudicial statement having as its only basis a statement by one witness only that he knew nothing of the election and was not present but had heard a rumor of money being used in it. As to the law, without making the same the point of its decision, in stating in its opinion that it disagrees with the Creek Supreme Courts finding that the fence was a lawful fence, and that on the contrary it was a public nuisance which any citizen by force could abate.

It is submitted: First, that the inquiry as to the election and the fence was not one for the Court of Claims to make. Second, that the Court of Claims in law and in fact was wrong if the matter were unembarrassed and open to its investigation.

The Creeks when the present controversy arose were invested by treaty with power of local self government. Their statute made their district judge the judge of the election and the party to decide as to the making of a fence contract. Their constitution made their Supreme Court the final arbiter of Creek judicial questions. An inquiry into the validity of the election, of the contract and of the subsequent right of Turner to construct the fence under arrangement with the nation involves necessarily an invasion of their then treaty rights and their privileges with reference to their internal affairs.

In Delaware Nation against the Cherokee Nation (No. 193 U. S., 128–146), this court said, (p. 144):

"It is claimed that these amendments were illegally adopted for want of compliance with authorized methods for amending the national constitution. But the Nation has never undertaken to set them aside or call in question their force and effect. * * * The Cherokee Nation has many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community and treaties have been made with them in that character. It is not reasonable to suppose that in the act under which these proceedings were brought it was intended to authorize inquiry into the administration of the political affairs of the Cherokee Nation, with a view to setting aside the adoption of constitutional amendments and the revision of political action in admitting persons to citizenship in the Nation under authority of its constitution. The same conclusion disposes of the contention of the appellants that relief can be granted in this case in respect to alleged maladministration of the financial affairs of the Cherokee Nation, with a view to holding it to account in favor of the Delawares prosecuting this suit. We are authorized by the enabling act to determine the contractual rights of the Delawares in the national lands and funds; not to overhaul the political and administrative action of the Cherokee Nation."

If the matter were open to inquiry the court below is in error, (a) in holding that under the law it could go behind the finding of the judge who held the election; (b) in holding, or stating rather without holding, that all the members of Pussy, Tiger and Co. were not citizens or entitled to the privileges of citizens of the Creek Nation and that therefore either the fence election and

the letting of the tence contract to Pussy, Tiger & Co. was illegal or that the latter's agreement with Turner or Blackstone & Turner were illegal; (c) in concluding that it was fraudulent, or wrong, or contrary to the public morals of the Indians and the time in question, for those Creek citizens resident in the "neighborhood" of the Deep Fork district who were in favor of establishment of a border pasture fence in the district to come together, associate as an organization for the purpose of carrying the pasture fence proposition in an election to be called and, as they were not possessed of the means to build the fence or to use the pasture themselves, to agree with Turner that if he would finance the matter and build the fence, pay the national tax and pay them for their rights as entitled to communal use of the land of their "neighborhood" or "district" that he could have the exclusive privilege of grazing outside cattle within the fenced area—the universal custom and usage as was proved in the instant case being, where fences were erected, to permit persons living and grazing cattle in the fenced area to continue grazing therein free of charge the few cattle they owned.

The statute expressly conferred on the district judge the determination of all questions relating to the election and the letting of contract pursuant to the election held. His action therefore in the absence of fraud or gross mistake imputing fraud is conclusive or at the least at this date was presumably based on a correct exercise of the functions devolved on him.

Martinsburg vs. March, 114 U. S., 549.

The court below is in error as to the citizenship of Turner & Blackstone and as to the jurisdiction of the Creek district judge to call the election and award the

contract. The court below has found that Turner was a member of the mercantile firm of Blackstone & Turner, that Turner was intermarried with a Creek Indian citizen and that Blackstone was a Cherokee.

By Article III, section one, of its constitution (p. 25), Turner as an intermarried non-citizen was entitled to all the rights of a Creek citizen. His firm of Turner & Blackstone would have been intruders and not entitled to do business in the Creek Nation were they non-citizens. Blackstone as a Cherokee Indian living among the Creeks had by compact between the two tribes and their usages, customs the same rights except that of participation in final distribution as Creek citizens.

By the compact between the Creek, Cherokee and certain other tribes approved by the Creeks in 1887 and set forth in the McKellop 1893 edition of the Constitution and Laws of the Muscogee or Creek Nation referred to in the Findings of Fact at page 157 it is provided:

> "Sec. 9. Any citizen of one nation may be admitted to citizenshp in another nation, party hereto, by consent of the proper authorities of such nation.
>
> "Sec. 12. The legislative authorities of the nanations, parties to this compact, may regulate by law, the time, manner and conditions upon which the citizens of the other nations, parties to this compact, may be allowed to reside within its limits for the purpose of trade, stock raising, farming or other business or pleasure."

Blackstone & Turner both were recognized by the Creeks as entitled to privileges the same as Creek citizens. They did not participate and there is no finding

that they did participate in the election. But they were entitled to obtain by contract, assignment, agreement or otherwise the right to build the fence that had been voted to Pussy, Tiger & Co. The matter was purely one of internal concern to the Creeks. It was of no materiality whether the Creek citizens of the Deep Fork district had or had not made arrangements with others to build the fence. The statute said the election should be called whenever "any number of citizens of the district" notified the judge of their desire for a protective pasture.

The situation would seem to be governed as to this court, even conceding arguendo only that the court will go behind Judge Knight's acts, by Eddy vs. Lafayette, 163 U. S., 465, arising from an action brought by Lafayette to recover from Eddy as a railroad receiver for loss of hay cut by Lafayette from Creek Indian lands and burned by locomotive sparks. The defense was that Lafayette, who was a white man and a non-citizen of the Creek Nation, having a profit-sharing arrangement with a Creek Indian, had cut the hay in violation of a law of the Creek Nation and had no title to the hay. This court said:

> "There was no evidence tending to show that Mrs. Hailey (the Creek Indian( in procuring the hay in question to be cut and put up was acting illegally or was in any wise a trespasser. And the statute above quoted implies that citizens of the nation might cut hay without limit from the common pasturage, as it forbids only non-citizen traders from cutting hay from the common pasturage, and we agree with the court below that there is nothing in the present record that would authorize us to say that the hay was gathered on the public domain without license. No law of

> the nation was shown forbidding Mrs. Hailey from cutting hay on land which she occupied in common with other members of the Creek Nation."

It must be concluded, we contend therefore, that Pussy, Tiger & Co. had a right to have the election called and upon obtaining a vote of 59 to 30 to obtain from Judge Knight a contract giving them the right to fence the enclosure and thereafter to assign over their rights, for a consideration, to Turner or Blackstone & Turner as financially able to construct the fence and arrange for pasturing cattle within the same at a profit to himself.

The Creek law and the Creek custom and practice plainly contemplated such a procedure. A contract ordinarily, and unless prohibited, is assignable. The finding of the court is that the Creeks were poor, illiterate, with few cattle. *To say that they themselves must build the fence and must pasture their own cattle within it and that the Creeks who were granted the right by contract to enclose the pasture could not make practical business arrangements with respect to fence construction and pasturage within it would be to make mockery of the Indian rights.. So to hold in any but this case of claim against the nation would have been bitterly resented and denounced by the Creeks themselves.*

Thus Chief Perryman in the quoted letter of Nov. 1, 1890, wrote United States Indian Agent Bennett that under the Creek statute it was "plainly to be seen" that citizens granted contracts to build pasture fences had "special rights to introduce cattle in these authorized pastures," and that "unless I find that non-citizens are locating stock against the wishes of the citizens own-

these pastures it is taken and held by this office that these citizens have a right under such acts to introduce and hold imported cattle in the pastures so long as they comply with the laws regulating such pastures."

This being the position of the Creeks themselves it is submitted that the learned court below was obviously in error in speaking of the letting by Pussy, Tiger & Co. to Turner of a contract for construction of the fence, and by Turner of grazing privileges to the Texas cattle firm of Wagoner & Son, as a public nuisance which any citizen could abate, or of the grant to Pussy, Tiger & Co. as illegal because of association therein of Turner & Blackstone, intermarried Creek Indians.

An attempt has been made by the Creek National Attorney to defeat this claim, contrary to the real former interests of the Creeks themselves, on the ground that the Creek Border Pasture fence statute was unlawful as being in violation of section 2116 of the revised statutes, providing that "no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the constitution."

If this contention be correct and the matter not be controlled by section 2117, heretofore quoted, and the Creek statute and custom of letting outsiders in, provided they paid the Creek national tax and made satisfactory business arrangements with the Creek citizens having procured the contract to build border pasture fences in particular neighborhoods, then the result would have been to compel the Creek pastures to remain practically waste, the Creeks having few cattle themselves, or the Creeks

lands, in the alternative, for lack of fences, would have been eaten up by invasions of outside drifting cattle for whose occupancy payment could be obtained from no one. Secretary Teller and others as heretofore shown did not so interpret the statutes.

Nor did the late Mr. Justice Brewer of this court, for in U. S. vs. Hunter, 21 Fed., 615, he held that the Indian tribe might consent for any brief and reasonable time to alease or agreement whereby a right to graze cattle was conferred without the lessee being guilty of a violation of section 2116.

> See also Land Co. vs. Thompson, 57 Kan., 792–96. Morris vs. Hitchcock, 21 App. D. C., 565.

That these pasture fence contracts granted by the Creek Nation were assignable was expresly held in Wasson vs. Willison, 58 S. W., 574, and Wilcoxen vs. Hybarger, 38 S. W., 669.

That Turner followed strictly the mode of operations prevalent at this time among the Creeks whereby, the nation's grass being a communal estate, with each citizen having an undivided interest in the whole, the matter was worked out, by custom and statute, through other persons with financial ability paying the Creek Nation a "grass tax" and paying the people living in the neighborhood a certain amount for permitting use of the grass of their neighborhood by outside cattle (the Indians having the right as well recokniged to graze their few cattle with the others in the enclosure) was thoroughly proven in the case by claimant and is thus found, in the narrowest form possibly by the court in its findings:

> "Several instances are shown by the evidence where under said act 'non citizens' made arrangements with 'citizens' that the latter should apply for the right to have a pasture and upon its being granted the non citizen would use it for pasturage and pay the citizens who had secured it."

2 It is submitted that the case as made is not one where claimant should be denied remedy for his loss sustained by the direct overt acts of some of the highest responsible authorities of the Creek Nation, sanctioned and concurred in, tacitly at least, by other chief officials and heads of the Creek Nation itself, after contract duly entered into pursuant to the statutes and custom of the Creek Nation.

Even conceding arguendo only, what is not in law or in fact conceded, namely, that the arrangement was not a lawful one that does not bar relief.

A complaining party to a contract that is not illegal *per se* but merely prohibited frequently is afforded relief, though the same is an exception to the general rule, and relief is given where public policy is considered as advanced by allowing relief to be given. Similarly, the rule of law, whereby courts as matter of public policy refuse relief to both parties on an illegal contract has no application where there is a statute (as the jurisdictional act in the instant case) showing it to be the policy of the legislature that relief may be afforded.

In Xenia First Nat. Bank vs. Stewart, 107 U. S., 676, a loan was enforced, made by a national bank upon a pledge of its own shares, through section 5201, Rev. Stats,. expressly prohibits such a loan.

The learned Court of Claims in its opinion also intimates that relief cannot be afforded and attacks the fence

election as invalid as a matter of public policy because the members of Pussy, Tiger & Co. were pecuniarily interested in the result of the election inasmuch as they were to receive under the pasture arrangements a certain amount of money quarterly for enclosure of the land of their neighborhood and the grazing of cattle therein. Counsel understand that public policy is a matter of the times and the people and their condition and is not to be applied where the moral sense of the community involved approved the thing later held up to condemnation. That the Creek Nation and people held the view that it was entirely right, just and proper that both the nation and the people of any particular neighborhood, if a majority of such people voted to build a fence, might collect a tax or money payment for use of their grass by grazing cattle within a fenced enclosure is shown by the Creek National statute, Chief Perryman's letter and the finding just quoted. The Creek Nation at this time was in a transition state from tribal conditions to allotment in severalty; the day of the old free range for Indians and outsiders had passed; the Indians recognized that their grass was a thing of value, and that value they recognized as belonging in part to the nation and in part to the people living in certain affected districts; severalty had not yet come with its small farms. So they enacted their pasture-fence law. So claimant Turner, following others, entered into a contract, with rights necessarily incident thereto, that was far preferable to the Indians' grass being eaten out free by either drifting outside cattle or cattle barons within their own borders. Unfortunately he came into opposition to the Creek National Treasurer's private interests and that high official being

unable to find a legal flaw within the understanding of the Creeks did succeed by force, through the connivance and at least tacit cooperation of all the other authorities of the Creek Nation, in destroying the fence under construction, and with it burned in destroying the contract the nation had made. If a liability cannot attach in such circumstances then a wrong must exist without a remedy and a nation be not liable for acts of, nor represented by, those it holds forth as its accrediated officers and representatives.

That the Principal Chief and the District Judge had ample power from the nation to meet the situation will appear from these extracts from the book of Creek statutes referred to by the Court of Claims in its findings on page 26:

> SEC. 9. He (the Principal Chief) shall have power to suspend any Judicial or Executive officer who neglects the duties of his office, or is guilty of misdemeanor in the same.
>
> SEC. 24. He (the National Treasurer) shall receive, have charge of and disburse the funds of the Muskogee Nation, according to the provisions of the National Council.
>
> SEC. 100. There shall be established in each district, at such point as the citizens of the district shall decide, a District Court; to each Court there shall be attached one Judge, one Prosecuting Attorney, and a company of Light Horsemen, consisting of one Captain and four privates.
>
> SEC. 113. Should any officer in any district require assistance to execute any law of the Muskogee Nation, the District Judge shall call upon any other District Judge or all other District Judges in the Nation for assistance, which assistance such Judge or Judges are authorized and required to render.

SEC. 115. The Judge of each District shall * * * have the issuance of writs, summons and court scrip. He shall have the power to order his Light Horsemen to any portion of his District, and when actually necessary to any portion of the Muskogee Nation. In case of actual need, he shall have the power of calling to his aid the police force of other districts.

SEC. 122. The Light Horse Company shall be the police force of the district.

SEC. 124. Any Light Horseman guilty of disobeying a legal order from the Judge, either by neglect or willfully, shall be removed from office.

SEC. 134. Any person who shall resist, abuse or injure any officer of this Nation while in the discharge of his official duties, shall, upon conviction, receive for each offense not less than 25 nor more than 100 lashes upon the bare back, at the discretion of the court.

SEC. 198. All meetings and conventions, and all secret movements, having for their object the prevention of the execution of law, or the subversion of the constitution and laws, are forbidden under the penalty of one hundred lashes on the bare back for each offense committed by every person participating therein.

SEC. 201. No person shall carry, knowingly, any message or dispatch to forward or promote any move having a tendency to prevent the free operation of the constitution and laws, under penalty of a fine of fifty ($50.00) dollars, and upon failure to pay he shall receive twenty-five lashes upon the bare back.

## The Jurisdictional Question.

The court below, without deciding the matter, has intimated doubt as to its jurisdiction of the case. Coun-

sel believe no extended discussion of the question necessary under the facts and circumstances of the instant case, however interesting the point may have been had the Creek Nation by its national attorney not have actually appeared throughout all proceedings, have cross-examined claimant's witnesses and examined witnesses on behalf of the Creek Nation before the Court of Claims itself first raised the point and decided this case, in effect, adversely thereon to claimant and then when the full situation was disclosed to it adversely on the merits.

The point involved arises from the fact that the jurisdictional act did not provide any machinery for getting the Creek Nation into court by service of process and the Court of Claims' rules do not provide for service of process on any defendant except the United States.

The act, however, did confer full jurisdiction over the subject matter of the instant case and it did create the issue, which issue is within the point decided by the Court of Claims and within what would be decided by the court did it adjudicate in favor of claimant.

The matter of jurisdiction is correctly defined by Bouvier thus:

> "The right to adjudicate concerning the subject mater in the given case. To constitute this there are three essentials: 1st, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; 2d, the proper parties must be present; and 3d, the point decided must be, in substance and effect, within the issue. 1 Black on Judgments, paragraph 242."

The first and third are conceded herein. The second the parties themselves have established. The Creek Na-

tion was represented when suit was authorized by a principal chief and a national attorney, which latter official acted under a contract with the nation approved by the Secretary of the Interior as required by the law. Due process is met where there is notice and hearing or opportunity to be heard. Service of process is usual but actual appearance dispenses therewith universally. The Creek Nation appeared, upon notice, and cross-examined claimant's witnesses, its principal chief and its national attorney appearing and participating. As a matter of precaution merely, the United States was sued and served. The nation adduced its evidence by introducing and examining its witnesses. Briefs were filed and the nation by its national attorney took part in the final hearing. This surely constituted appearance and made service of process unnecessary.

## Damages.

The damages claimed are those only that naturally followed from the fence destruction as a normal proximate result to be expected.

The first is the actual loss of materials and labor expended on the destroyed fence, namely, $10,078.76. The destruction is found to have occurred not later than the first Monday in June 1891 (p. 32), which claimant will call June 7. The provision of the statute forbidding the Court of Claims to award interest has reference only to claims against the United States. Interest therefore in law and equity should be allowed. In law it would be allowed as upon an action of assumpsit and where equity is directed to be done "interest goes with the principal

as the fruit with the tree." Himely vs. Rose, 6 Cranch, 313.

The remainder of the damages are not so clear. The findings of fact state that under the arrangement made $2500 was paid by Turner to Pussy, Tiger & Co. as consideration for their rights in the enclosure and under their contract with the Creek Nation pursuant to the pasture-fence election. This was the custom and was the purpose of the Creek pasture-fence statute which contemplated a grass tax of 5 cents to the nation and then that the Creek citizens having the fence contract would sublet or assign cattle privileges for a consideration. This money having been paid before the destruction of the fence Turner is entitled to recover the same, with interest from April 1, 1891 (p. 33), he being vested with all the rights of Blackstone & Turner.

The next item of damage is the loss of profits. The contract with the Creek Nation was for three years, the statute providing (p. 27) "with the privilege of renewal." Under his arrangement with Wagoner & Son (p. 31) claimant was to receive $27,500 a year during the term of the contract or $82,500 in three years. For this privilege he was to pay, the fence enclosing 250,000 acres approximately (its exact acreage until enclosed not being certain as a basis on which Judge Knight was to have laid his annual national tax assessment of 5 cents per acre) 5 cents per acre or $12,500 per year, making $37,500 in three years. The payment to the hundred members of Pussy, Tiger & Co. was to have been $100 per year each, or $10,000 per year, making $30,000 in three years, the aggregate of payments therefore being $67,500, leaving a balance of profit for Turner of $15,000 for the three

years. As to the matter of the cost of the fence that counsel submit should not be deducted in computing profits, the privilege of a three-year renewal of contract being the equivalent of the cost of erection of the fence.

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80174—18—1

# In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CLARENCE W. TURNER, APPELLANT,
*v.*
THE UNITED STATES AND THE CREEK NATION OF INDIANS. } No. 33.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF ON BEHALF OF DEFENDANTS.

### STATEMENT.

This suit was brought in the Court of Claims under section 26 of the act of May 29, 1908 (35 Stats. 444, 457), for the recovery of damages, stated at $105,698.03, arising out of the destruction of a pasture fence in the Creek Nation by a mob of Creek Indians.

The firm of Blackstone and Turner, composed of Pleasant N. Blackstone and Clarence W. Turner, were prior to, during, and subsequent to the year 1890 engaged in the business of raising and selling cattle. Turner had resided in the Creek Nation from the early seventies and in 1883 had married the daughter of an Indian of Cherokee blood, who had been adopted into the Creek Nation prior to the Civil War. His

wife was raised as a Creek and received an allotment of Creek lands, but he was not himself a citizen of the Creek Nation entitled to share in the lands and annuities of the tribe. He resided at Muskogee and was the owner and manager of the Turner Hardware Company. Blackstone was of Cherokee blood and was not a citizen of the Creek Nation. He died sometime in April, 1903, and this suit was brought by Turner, the surviving partner of the firm of Blackstone and Turner. (Rec. 24, 28.)

By article 10 of the treaty of June 14, 1866 (14 Stats. 785), the Creeks agreed to legislation by Congress for the better administration of justice and the protection of personal and property rights in the Indian Territory, provided that such legislation did not in any manner interfere with or annul the present tribal organization, rights, laws, privileges, and customs. The Creek Nation kept up its tribal organization, with complete governmental machinery, consisting of a judiciary system and legislative and executive departments, until their tribal government was terminated on March 4, 1906, by section 46 of the act of March 21, 1901 (31 Stats. 861, 872). (Rec. 25.)

It appears that a few citizens of the Creek Nation had inclosed large areas of tribal lands for their exclusive use in raising cattle, to the injury of many citizens living in the vicinity of such inclosures, a custom which threatened a monopoly dangerous to the general welfare of the nation. In order to remedy these conditions an act was passed by the Creek

Council on October 26, 1889, prohibiting the continuance of such pastures after May 1, 1890, and providing against the influx of cattle from neighboring nations by authorizing pastures along the borders of the Creek Nation greater in extent than one mile square upon application of any of the citizens of the district to the district judge, who was required to call an election of the people of voting age of the neighborhood to be protected, to pass upon the question whether such pastures were needed, and upon their vote in favor of such pastures it became the duty of the said judge to grant to such citizens the right of pasture, upon their entering into a contract to build a substantial fence of four or more strands of wire, and to pay not less than five cents per acre per annum, the contract to describe the location of the lands and to include all provisions necessary to insure and protect the interests of the nation and the citizens thereof, and to remain in force for a period of three years with a provision for renewal. The tax of five cents per acre was to be collected by the district judge, beginning assessments from the date of the contract, who was to pay the same into the national treasury, quarterly, on the first day of January, April, July, and August of each year, and to render a full report to the national council of all moneys collected, together with the receipts of the national treasury. Failure on the part of the owner of the pasture to make quarterly payments, or to comply with any of the obligations in the contract should operate as a forfeiture of the franchise granted

thereby, the forfeiture to be declared and enforced by the district judge. (Rec. 26–28.)

After the passage of the act of 1889 the firm of Blackstone and Turner conceived a scheme by which they could secure a large area of grazing lands in the Deep Fork district. They induced one hundred citizens of the Creek Nation to form an association to be known as Pussy, Tiger and Company, and to apply for this tract of land as a pasture. This association was composed of one Pussy and one Tiger, who lived four and eighteen miles, respectively, from the proposed pasture, and ninety-eight other Indians, illiterate full-bloods, generally poor, a number of whom had a few cattle, from 15 to 20 head, which grazed in the same neighborhood. The said Indians were not financially able to build the pasture fence, but relied upon said Turner to finance the scheme. (Rec. 28, 29, 32.)

Pussy, Tiger and Company made application to the judge of the Deep Fork district, and an election was held as required by the act of 1889, at which more than one hundred citizens of the neighborhood voted, and the application for the pasture was defeated. Upon the same day that the result was announced Pussy notified the judge that another election was desired, and Pussy, Tiger and Company filed an application for a second election, and the judge after some of the voters had left the place announced to the people that another election would be held on October 11th. The people concerned knew where the proposed pasture would be situated but they were not informed

as to the extent of its acreage. The formal application for a second election, signed by Pussy, Tiger and Company, was filed on February 30, 1890, and set out by natural boundaries the location of the proposed pasture, stating the same to be not less than 100,000 acres, and contained an indorsement by the district judge ordering an election to be held on October 11, 1890 (Rec. 29).

The second election was held on October 11, 1890, and as shown by the certificate of the district judge, fifty-nine voted for and thirty-nine against the pasture, and that the application had been favorably acted upon in accordance with the laws of the nation. There were over 300 voters in the Deep Fork district, but the evidence does not show the number of voters living in the neighborhood of the pasture. However, at said election a majority of the Indians in the association of Pussy, Tiger and Company voted for the pasture. After the result of the second election was announced, a contract was entered into between the district judge and the association, by which the location of the pasture was set out as a tract of land 16 by 25 miles, containing not less than 100,000 acres, and Pussy, Tiger and Company agreed on their part to build a substantial fence of four strands of barbed wire inclosing the said tract, and to bind themselves to comply with all the provisions of the act of October 26, 1889, which was made a part of the contract. The tract of land inclosed within the pasture amounted to about 256,000 acres. (Rec. 30.)

It was understood and agreed between the parties composing the association of Pussy, Tiger and Company that in the event of the pasture being established, Blackstone and Turner would pay to each of the one hundred Indians $100 per annum, quarterly, and to the Creek Nation the tax of five cents per acre per annum, and that the said firm of Blackstone and Turner should retain any balances of any fund that might accrue from the transfer of the right to others to use the pasture. (Rec., 28, 29.)

At sometime prior to the winter of 1890 Blackstone and Turner made an agreement with a firm known as Daniel Waggoner and Son, who were engaged in cattle raising and grazed large numbers of cattle, to assign to it the right to use and graze their cattle upon the said pasture for the sum of $27,500 a year during the term of the contract with Pussy, Tiger and Company. At that time the building of the fence had not commenced, and Waggoner and Son advanced to Blackstone and Turner the sum of $10,000, to be used in the purchase of material with which to build the fence around said pasture, the same to be a credit on the annual payment of the $27,500. After the agreement with Waggoner and Son, the said Turner employed a man named Moore to erect the fence, agreeing to pay him $36 a mile and $2 for each gate erected. The material for erecting the fence was purchased from the Turner Hardware Company, owned and controlled by said Turner, and the posts were cut from Indian lands. Moore employed men, and commenced the building of the

fence early in March, 1891. Before and after the commencement of the work complaints against and objections to the fence were made by Creek Indians living in the district, and from the commencement and throughout its construction rumors reached the parties engaged in erecting the fence of threats by Indians to destroy it. (Rec., 31, 33.)

A number of citizens of the nation living within the area of the pasture, through the treasurer of the nation, several times requested the principal chief to prevent the construction of the fence, and notified him that if he did not do so they would destroy it, but these representations appear to have been without result. About the last of April, or early in May, Turner, learning of the threats to destroy the fence, informed Waggoner & Son of the same. Thereupon Waggoner and Son on May 4, 1891, filed in the United States Court for the First Judicial Division of the Indian Territory, a bill for an injunction against the principal chief, L. C. Perryman, of the Creek Nation, and the district judge, Jacob Knight, to prevent the destruction of the fence. On May 4, 1891, a restraining order was granted and indemnity bond filed, and on May 11, 1891, an order granting a preliminary injunction was filed and an indemnity bond approved and filed on May 26, 1891. (Rec., 16–20, 31, 32.)

During the latter part of May threats increased and notices were placed at different parts of the pasture boundary, prohibiting the erection of the fence, and some days before its destruction, Indians

assembled in the night near where the work was being done and attempted to scare away the workmen by making noises and firing guns, and making threats of personal violence against the workmen, some of whom were Indians. Indians representing themselves as light-horsemen (Indian police) informed Moore, the fence builder, that the fence would be destroyed, and a few days before its destruction Isparecher, a full blood and leader of the full bloods in the neighborhood of the fence, informed the builder that unless the work was suspended the Indians would destroy the fence, but Moore refused to do so. On the first Monday in June, 1891, three groups of Indians, acting in concert, in the daytime, attacked the fence on three sides with axes, and by cutting the wire and posts destroyed the entire fence, of which about sixty miles had been completed, posts erected around the balance, and wire strung on all except about twenty miles. The Indians engaged in the destruction, consisted of more than 100, composed of citizens living outside and inside of the fence. The reasons which actuated the destruction appear to have been the size of the inclosure, its interference with the common right of the pasture, and rumors circulated among the Indians in the district that money had been used in the election. The leaders in the work of destruction were Isparecher, living about eight miles from the neighborhood, who afterwards became the principal chief of the nation, and who had a ranch near the boundaries of the pasture and grazed several hundred

head of cattle on the lands in question, Moore, living about six miles from the pasture, who also grazed a number of cattle on said lands, and Fixico, an Indian preacher, who lived in the neighborhood of the fence. The evidence does not disclose the names of the Indians engaged in the work of destruction. (Rec., 32, 33.)

The threats to destroy the fence were matters of general notoriety in the Deep Fork district, but the parties engaged in building the fence did not apply to the Indian authorities for protection, and none of said authorities took any steps to prevent the destruction. (Rec. 33.)

At the time of the destruction Blackstone and Turner had expended the sum of $12,046.82 on the erection of the fence. They recovered materials valued at $1,968.46, leaving a net loss of $10,078.36. Later the firm of Blackstone and Turner becoming insolvent, the said Turner repaid to Waggoner and Son the $10,000 advanced as aforesaid and used in the purchase of material for the fence from the Turner Hardware Company, owned and controlled by said Turner. In November, 1892, October, 1893, November, 1893, and November, 1894, the plaintiff presented his claim to the Creek Council for $10,078.36, but payment was refused. The only payments tendered, or made on account of the tax of five cents an acre yearly, were auditors' certificates amounting to $1,250, legal tender for taxes in said nation, delivered by Moty Tiger to the district judge as a quarterly payment under the contract with Pussy, Tiger and

Company, who delivered them to the National Treasurer. The Treasurer refused to receive the payment, and the certificates were returned by him to the said Tiger a day or two before April 2, 1891. A short time thereafter Turner sent to Moty Tiger $2,500 to be distributed among the members of the association of Pussy, Tiger and Company. (Rec. 33.)

A general traverse to the petition was filed by the United States on January 6, 1915, a demurrer and motion to dismiss by the Creek Nation on October 26, 1915, objections by the United States to being made a party to the suit on November 30, 1915, and answer to the petition by the Creek Nation on December 1, 1915. (Rec. 35.)

The parties went to trial on the petition, answer of the Creek Nation to the petition, objections of the United States to being made a party to the suit, and the evidence. The court on April 10, 1916, filed findings of fact and a conclusion of law dismissing the petition, with an opinion by the Chief Justice. From this judgment an appeal has been taken.

## ARGUMENT.

### JURISDICTION.

The Court of Claims assumed jurisdiction under the congressional reference and dismissed the petition upon the ground that the Creek Nation was not liable for the destruction of the fence by a mob of Indians, acting without authority from the tribal government, but the court appears to have entertained a strong doubt as to its jurisdiction over the

subject matter of the suit under the act. (Rec. 36, 37.) The jurisdictional act, section 26, act of March 29, 1908 (35 Stats. 444, 457), reads:

> SEC. 26. That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States.

The lower court construing this act (Rec. 36), said:

> One of the first questions presented is whether the United States can be made a party to the suit. The plaintiff sought to make them a party, and they through their Attorney General objected. The United States can not be sued without their consent, and there is nothing in the jurisdictional act authorizing the United States to be sued. We are clearly of the opinion that they can not be made parties in this proceeding. (*Green* v. *Menominee Indians*, 46 C. Cls. 68; 47 Ib. 281; 233 U. S. 558.)

This court in *United States* v. *Klein* (13 Wall. 128, 145), said that the Court of Claims was one of those inferior courts authorized by Congress under section 1, Article II, of the Constitution.

Section 2, Article III, of the Constitution of the United States enumerates among the controversies over which the jurisdiction of the Federal courts shall extend "controversies to which the United States shall be a party." Congress in apportioning the controversies described in the Constitution, among the different Federal courts, assigned to this court controversies to which the United States shall be a party defendant. (Sec. 145, Judicial Code.)

The injuries complained of resulted from the acts of an irresponsible mob against whom suits could have been brought in the United States court of the Indian Territory, which, a few days previous to the destruction of the fence, had issued an injunction (Rec. 19) and the only excuse the plaintiff was able to offer for not adopting that course was the difficulty of recovering damages from the individuals who had committed the tort. This court in *Stephens* v. *The Cherokee Nation* (174 U. S. 445, 449), said:

> The Indians of the Indian Territory maintain an Indian government, have legislative bodies and executive and judicial officers. All controversies between Indian citizens are disposed of in these local courts; controversies between white people and Indians can not be settled in these courts, but must be taken into the court of the Territory established by the United States.

The court in *Ke-tuc-e-mun-quah* v. *McClure* (122 Ind. 541), said that the defense that the plaintiff could not be sued in respect to his alloted lands was

no reason why judgment should not be rendered, as the debt might be collected without resort to his land.

The fifth amendment to the Constitution of the United States declares that "no person shall be deprived of life, liberty, and property without due process of law." This court has said that the words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land." Murray &c. v. Hoboken &c. Co. 18 How. 272, 276.)

Mr. Cooley in his work on the Principles of Constitutional Law, third edition, page 244, says:

> In general, whatever the State establishes will be due process of law, so that it be general and impartial, and disregard no provision of Federal or State Constitution.

Appellant should have adopted the remedy furnished by Congress and have brought his suit against the tort feasors in the United States territorial court. Having failed to do so it would be in violation of the Constitution to drag the Creek Nation into the Court of Claims by a special act of Congress.

### THE BAR OF THE STATUTE OF LIMITATIONS.

Section 31 of the act of May 2, 1890 (26 Stat. 81, 94, 95), entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," extended the laws of the State of Arkanas, not in conflict with any law of

Congress or not locally inapplicable, over the Indian Territory. These laws included the statutes of limitation in force in Arkansas, which provided that actions should be brought within three years on contracts expressed or implied not in writing, or for trespass on lands (sec. 2945, Ind. Terr. Stats.) and within five years on instruments in writing not under seal (Id. 2950).

Suit for damages could have been brought in the United States Court, which issued the injunction, against the Indians who destroyed the fence at any time within three years from the first Monday in June, 1891, the date on which the fence was destroyed. Three of the leaders of the mob were known, and two of them appear by the findings to have owned considerable property (Rec. 32); at any rate the parties who committed the trespass were the parties against whom the suit should have been brought. Mr. Cooley, in his work on the Principles of Constitutional Law, first edition, page 328, says:

> When the time limited by the statute has been suffered to lapse without suit, so that the right of action is gone, it is not competent to remove it by retrospective legislation, since this would be equivalent to creating a new demand.

The jurisdictional act was not passed and the suit brought until about seventeen years after the alleged trespass. Congress recognizing these facts did not in the jurisdictional act waive the statute of limitations. (*Sac and Fox Indians*, 220 U. S. 481, 489; *Green* v. *Menominee Tribe*, 233 U. S. 558, 568.)

THE CONTRACT AND AGREEMENTS UNDER WHICH CLAIM IS MADE WERE FRAUDULENT AND VOID.

The act of the Creek Council approved October 26, 1889 (Rec., 26–28), was enacted for the protection of the citizens of the nation in the use of their grazing lands, by preventing the influx of stock from the country outside of the tribal boundaries, and with this end in view the council provided for contracts with citizens of the nation for the inclosure of pastures along the tribal boundaries greater in extent than one mile square, which evidently contemplated a tract something over 640 acres. The act was intended to prevent the very thing that happened, the acquisition by outsiders and noncitizens of an immense tract of 256,000 acres, and it was this violation of the spirit and letter of the act which caused the destruction of the pasture fence. (Rec., 33.)

Blackstone and Turner well knew when they concocted the scheme for obtaining possession of these lands by indirection that they were violating the law, otherwise they would have made application for the lands in their own name instead of through Pussy, Tiger and Company. Pussy and Tiger were also acting in bad faith when, together with ninety-eight ignorant and illiterate members of the tribe, they applied for the pasture, as the Indians concerned were financially unable to enclose the pasture, and intended to turn it over to Blackstone and Turner, who were to pay each member of the association $100 a year, and to pay the treasurer of the nation the tax of five cents per acre, and to retain any

further sums that they might secure. How the understanding or agreement between Blackstone and Turner and the association was evidenced is not disclosed by the record (Rec., 28, 29), nor does this agreement appear to have been known to the authorities of the nation at the time the contract with Pussy, Tiger and Company was entered into. The contract itself, on its face, is tainted with fraud, for after describing boundaries embracing over 250,000 acres, it gave the contents as "not less than one hundred thousand acres." (Rec., 30.) Turner was dealing with ignorant and illiterate Indians who knew where the pasture was, but were not informed as to its acreage (Rec., 29, 32). As a further evidence of the bad faith of Blackstone and Turner, attention is called to the fact that nearly a year before the contract was signed by the district judge, Blackstone and Turner had made some kind of an agreement with Waggoner and Son, cattlemen, to turn the pasture over to them in consideration of the payment of $27,000 per annum. (Rec., 30, 31.) The contract with Pussy, Tiger and Company was clearly in violation of section 2116 of the Revised Statutes, which declares that:

> SEC. 2116. (Purchase of grants from Indians:) No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution.

The Attorney General, construing this provision (28 Op. 235, 237), said:

> A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes, and the duration of the term is immaterial. One who enters with cattle or live stock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with consent of the tribe.

The opinion of the Attorney General was followed in *Mayes* v. *Live Stock Association* (58 Kans. 712) and *Cherokee Strip Live Stock Association* v. *Cass Land and Cattle Company* (138 Mo. 394), which held that leases made with noncitizens for the pasturing of stock on Cherokee lands were in violation of section 2116, and therefore void, and that no suit could be maintained on such contracts.

If the agreement or understanding between Blackstone and Turner and Pussy, Tiger and Company, composed of tribal Indians, was verbal, it was void under section 4 of the statute of frauds as an attempt to convey an interest in lands by parol. If the agreement was in writing, it was void as in violation of section 2103 of the Revised Statutes, which declares that "No agreement shall be made by any person with any tribe of Indians or any individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for granting or procur-

ing any privilege to him or any other person in consideration of services for said Indians in relation to their lands, etc.," unless executed before a judge of a court of record and approved by the Secretary of the Interior and a Commissioner of Indian Affairs. This was the construction placed by the Court of Claims on a contract made with tribal Indians in the case of *Green* v. *Menominee Indians* (46 C. Cls. 68; 47 id. 281), affirmed by this court, 233 U. S. 558, 568, 569.

This court in *McMullen* v. *Hoffman* (174 U. S. 639, 654), said:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way toward carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

This case was later discussed in *Continental Wall Paper Company* v. *Voight and Sons Company* (212 U. S. 227, 262, 263)

IF THE CONTRACT BETWEEN THE DISTRICT JUDGE AND PUSSY, TIGER AND COMPANY AND THE AGREEMENT BETWEEN BLACKSTONE AND TURNER AND PUSSY, TIGER AND COMPANY HAD BEEN VALID AND BINDING, IT WAS BREACHED BY THE SAID BLACKSTONE AND TURNER.

The act of 1889 provided that the district judge shall collect the tax of five cents per acre per annum, commencing his assessments from the date of contract, "which he shall pay into the national treasury on the first day of each quarter beginning respectively with the months of January, April, July, and August of each year." (Rec. 27, 28.) The act further provided that "if any owner of a pasture shall fail to make any quarterly payment or fail to comply with any obligations embraced in the contract with the judge, then he shall forfeit all the franchise granted by the terms of his contract and the district judge shall so declare and enforce such forfeiture." Moty Tiger tendered to the district judge $1,250 in auditor's certificates, legal tender for taxes, about April 1, 1891. The treasurer of the nation refused to receive the payment and returned the certificates to the said Tiger. The payment was due January 1, 1891, and was much less than the amount of the quarterly payment due. It was computed at five cents per acre on 100,000 acres, while it should have been computed on 256,000 acres, the amount actually contained in the pasture, and the quarterly payment should have been $3,200.

THE CONTRACT HAVING BEEN ABANDONED, NO SUIT CAN BE MAINTAINED THEREON.

The fence, as shown by the findings of the Court of Claims, was destroyed by a mob of Indians without the sanction or knowledge of the Creek government. The parties engaged in building the fence did not, as they should have done, apply to the authorities of the nation for protection. (Rec. 32, 33.) The fence could probably have been rebuilt, the protection of the constituted authorities of the nation secured, and the pasture used until the expiration of the lease. Plaintiff, however, failed to perform his contract. The only things which would excuse the nonperformance of the contract are the act of God, the law, or the other party (*Dermott* v. *Jones*, 2 Wall. 1; *The Herriman*, Wall. 161, 172; *Railroad Company* v. *Smith*, 21 Wall. 255); and where the responsibility relied on arises subsequently to the making of the contract (*Jacksonville Railway* v. *Hooper*, 160 U. S. 514–527). Nothing was done by the defendants which prevented the plaintiff from performing his contract.

IF THE DESTRUCTION OF THE FENCE WAS A TORT THE CREEK NATION WAS NOT RESPONSIBLE.

For the purposes of this suit, the Creek Nation was a body politic with all the attributes of State sovereignty, but subject to the paramount authority of Congress to pass laws affecting personal and property rights. (Rec. 224, 225.)

Had the Creek Nation been merely an Indian tribe, subject to the ordinary tribal government, in no aspect of the case could it have been held responsible for the acts of a mob of lawless Indians.

The findings of the Court of Claims disclose no act of the Creek Council by which the nation assumed liability for the destruction of property by a mob. Without such an act the destruction of the pasture fence by a mob was a damage over which the courts have no jurisdiction. (*Lousiana* v. *Mayor*, 109 U. S. 285; *Gainfortone* v. *City of New Orleans*, 61 Fed. 64; *City* v. *Abbagnato*, 62 Fed. 240; *City of Chicago* v. *Pennsylvania Company*, 119 Fed. 497.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment of the lower court should be affirmed.

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The Supreme Court, U. S.
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No. 38.

In the

# Supreme Court of the United States.

October Term, 1915.

CLARENCE W. TURNER, Appellant,

vs.

The UNITED STATES, and
The CREEK NATION of INDIANS

Appeal from the District Court of Oklahoma.

Brief for Appellant.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 33.

CLARENCE W. TURNER, *Appellant,*

*vs.*

*The* UNITED STATES *and*
*The* CREEK NATION *of* INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF ON BEHALF OF THE CREEK NATION.

### *Statement.*

This suit was originally instituted in the Court of Claims by Clarence W. Turner, as the surviving partner of Turner & Blackstone, for the recovery of damages against the Creek Nation in the sum of $105,698.03, on account of the destruction of a pasture fence erected by them in the year 1891 within the territorial confines of the Creek Nation, and de-

stroyed by individual Creek Indians in the same year. The original petition in the cause was filed August 22, 1908.

**Creek National Government.**

The Creek Indians possessed a tribal organization and a system of laws by which they were governed until the year 1906, when the organization was terminated by Act of Congress. The tribal government consisted of executive, legislative and judicial departments. At the head of the executive department was the Principal Chief who was elected for a term of four years by a majority of the votes of the male citizens of the tribe. The legislative department consisted of a National Council composed of two houses, the House of Kings and the House of Warriors. The supreme law defining power was lodged in a high court consisting of five citizens, chosen by the National Council, and the nation was divided into six judicial districts, each provided with a judge, a prosecuting attorney, and a company of lighthorsemen, vested with police power under the direction of the judge. The National Treasurer was elected by the National Council, and it was his duty to receive and receipt for all national funds, and disburse them as provided by law. This tribal organization of Indians possessed all the attributes of sovereignty within the limits of its territory except that, by

the terms of a treaty concluded between the Creeks and the United States in 1866, the Creeks agreed that Congress might enact such laws as it deemed necessary for the better administration of justice and the protection of the rights of person and property within the Creek Nation. (Findings of Fact, III, Rec., p. 25.)

**Creek Law Providing for Creation of Pastures.**

At the time mentioned there was a law in force in the Creek Nation which gave to an intermarried non-citizen the right to live in the nation, and to enjoy all the privileges enjoyed by other citizens, except participation in tribal funds and in the final allotment of lands. In the year 1889 the Creek Council passed, and the Principal Chief approved, an Act authorizing the creation of enclosed pastures of a greater area than one square mile, to be located on the borders of the nation, under the conditions following: When any number of Creek citizens desired to establish such a pasture they were required to notify the judge of the district of their intention. It thereupon became the duty of the judge to give due notice to the people of the neighborhood of the time and place when and where there would be convened a meeting of voters at which those assembled should vote upon the question as to whether or not the pasture was needed. If a majority of the persons of

the neighborhood of voting age favored the establishment of the pasture then it became the duty of the judge to grant that privilege to such citizen or citizens as might contract to build a substantial fence of four or more strands of wire, and to pay for the grazing privileges not less than five cents per acre per year. This payment was in the nature of a tax, and was required to be paid quarterly into the national treasury on the first day of each quarter, beginning with the month of January of each year. The failure of the owner of the pasture to make the quarterly payment, or to comply with any condition of his contract, worked a forfeiture, and the district judge was empowered to declare and enforce such forfeiture. This law contemplated the letting of the privilege mentioned to Creek citizens. Neither Blackstone nor Turner was a Creek citizen, but Turner's wife was the daughter of a Cherokee Indian who had been adopted into the Creek Nation. She was reared as a Creek, and was given an allotment of land among the Creeks. (Findings of Fact, IV and V, Rec., pp. 26-27-28.)

**Plans of Blackstone & Turner.**

Pursuant to the act authorizing the establishment of these pastures Blackstone & Turner procured an organization, consisting of themselves and one hundred Creek Indians, having for its purpose an

application for the establishment of a pasture in Deep Fork District, and to this organization was given the name Pussy, Tiger & Company. Pussy and Tiger resided at some distance from the proposed pasture, but the remaining ninety-eight Indians lived within the pasture confines. They were made a part of the organization in furtherance of its purposes. There was an agreement between Blackstone & Turner and the one hundred Indians composing the organization that, if the pasture was established, Blackstone & Turner would pay to each of the Indians the sum of $100.00 per year during the life of the contract, payable quarterly, and that they would likewise pay the tax of five cents per acre per year, required by existing law to be paid into the Creek treasury. After paying these sums, Blackstone & Turner were to retain the balance of any funds that might result from their assignment of the pasture rights to other persons. The Indians were full-bloods, illiterate and, generally speaking, poor. They were not financially able to build about the pasture any fence, such as the law required, and it was not their intention to do so. Turner was to provide the means with which to build the fence. (Findings of Fact, VI, Rec., pp. 28-29.)

**Pasture Election, and Pussy, Tiger & Company's Contract With the District Judge.**

In due time Pussy, Tiger & Company presented to the judge of Deep Fork District their application, and pursuant thereto there was held an election at which the proposition was defeated. Thereupon, and upon the same day, the organization filed an application for a second election with the district judge, and the judge ordered a second election for October 11, 1890. The second election was held on the date so fixed, and this time the judge certified that the proposition had carried, and it appears that a majority of the Indians in the organization voted for the pasture. Thereafterwards the judge of the Deep Fork District and Pussy, Tiger & Company entered into a contract by the terms of which the latter was authorized to establish a pasture with certain territorial boundaries, which, the contract recited, embraced not less than one hundred thousand acres. Later it developed that these boundaries in fact embraced two h u n d r e d and fifty-six thousand acres. (Findings of Fact, VII, Rec., pp. 29-30.)

**Agreement Between Blackstone & Turner and Daniel Waggoner & Son.**

Daniel Waggoner & Son was a firm engaged in the cattle business. In the winter of 1890 Blackstone & Turner entered into a contract with Daniel Wag-

goner & Son by the terms of which the former agreed to assign to the latter the right to use the pasture for grazing purposes for a consideration of $27,500 per annum during the life of the contract. Daniel Waggoner & Son advanced to Blackstone & Turner the sum of $10,000.00 with which to purchase material to construct a fence around the pasture, and the sum so advanced was to be a credit on the annual rental. Turner employed a man named Moore to construct the fence, and furnished the wire and staples, but the posts were cut from Indian lands. Both before and after the work of constructing the fence was commenced, complaints and objections both to the fence and pasture were made by Creek Indians living in the district, and rumors of threats by Indians to destroy the fence came to those engaged in the work of building it. (Findings of Fact, VIII, Rec., p. 31.)

**Destruction of Fence by a Mob of Indians.**

Sixty miles of the fence was completed, and posts were set and wire strung along the remaining boundary of the tract except for about twenty miles. Daniel Waggoner & Son had turned their cattle in to graze on the pasture. Things were in this condition on the first Monday in June, 1891, and on that date a number of Creek Indians entered the pasture, destroyed the fence so built, and cut the wires. (Findings of Fact, IX and X, Rec., pp. 31-32.)

**Order Restraining Principal Chief Perryman and District Judge Knight From Destroying Fence.**

Prior to the destruction of the fence National Treasurer Moore called on the Principal Chief, L. C. Perryman, and notified him that the Indians intended to destroy the fence, but received from the Principal Chief no assurance as to what his action in the premises would be. On May 5, 1891, Daniel Waggoner & Son obtained from the United States Court at Muskogee an order restraining L. C. Perryman, Principal Chief, and Jacob Knight, District Judge, from interfering with, cutting down or damaging that part of the fence already constructed. Something more than one hundred Indians engaged in the destruction of the fence, and the band was composed of Indians residing both within and without the pasture. It appears by the findings of the Court of Claims that National Treasurer Moore was the only officer of the Creek Nation who participated. The threats to destroy the fence were a matter of general knowledge in the Deep Fork District, but the parties engaged in building it did not apply to the regularly constituted Indian authorities for protection, nor did those authorities take any steps to prevent the destruction of the fence. (Findings of Fact, X, Rec., pp. 33-34.)

**Blackstone & Turner's Tender of Taxes, Payment to Indians Composing Pussy, Tiger & Company, and Presentation of Claim to National Council.**

About the first of April, 1891, there was transmitted through Moty Tiger to the district judge auditors' certificates in the amount of $1,250.00, as the quarterly payment of taxes due under the contract at the rate of five cents per acre, but the district judge refused to receive them and returned them to Tiger. This was the only payment tendered on account of the tax. A little later Blackstone and Turner sent Moty Tiger $2,500.00 to be distributed among the members of Pussy, Tiger & Company. They had expended $12,046.62 on the construction of the fence, but their salvage from the materials destroyed was valued at $1,968.46, thus fixing their total loss at $10,078.16. Turner presented the claim to the Creek Council for this last sum four separate times during the following four successive years, but each time the council refused to make an appropriation to pay it. (Findings of Fact, XI, Rec., pp. 33-34.)

**Opinion of Supreme Court of Creek Nation.**

In November, 1896, the Supreme Court of the Creek Nation handed down an opinion, in response to the question presented to them by Pussy, Tiger & Company, as to whether the establishment of the pas-

ture in question was legal, deciding the question in the affirmative. (Findings of Fact, XI, Rec., pp. 33-34.)

**Act of Congress Authorizing Suit.**

The Act of Congress authorizing the institution of this suit reads as follows:

> "That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner of Muskogee, Oklahoma, against the Creek Nation for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

It will be noted that the above quoted section, which is No. 26 of the Act, prescribes no method of serving the petition as against the Creek Nation, nor do the r u l e s of the Court of Claims prescribe a method for such service. No application was made to the Court of Claims to prescribe a method for service. When the petition was filed a copy was mailed to the Principal Chief of the Creek Nation. (Findings of Fact, XII, Rec., p. 34.)

**Motion to Dismiss, Demurrer, and Submission of Case to Court of Claims.**

On the 25th day of October, 1915, the Creek National Attorney filed a motion to dismiss the case on the ground that the court was without jurisdiction, and entered his special appearance for the purpose of the motion. On the same day the Attorney General, acting for the United States, likewise filed a motion to dismiss the case for want of jurisdiction. The case was submitted on these motions and, without waiving the motions, upon its merits, the United States refusing, however, to appear further than to make the motion to dismiss for want of jurisdiction.

**Conclusion of Law, and Dismissal by Court of Claims.**

Upon the facts as found by the court the conclusion was reached that the plaintiff was not entitled to recover, and the claimant's petition was dismissed.

## ARGUMENT.

### I.

**The Creek Nation, possessing sovereign attributes, is not responsible for the acts of a mob, nor is it responsible for the malfeasance or misfeasance of its officers.**

The petition, which is the foundation of appellant Turner's claim, contains the allegations of fact following:

> "That on the contrary the responsible authorities of the Creek or Muskogee Nation or Tribe of Indians permitted a mob of Indians to assemble to terrorize those persons engaged in the construction of the pasture fence aforesaid, and finally effectually to destroy said pasture fence and the materials on the ground for the completion of said pasture fence by cutting down the posts and burning and destroying the materials composing said pasture fence. That on, to-wit: the ..... day of June, A. D. 1891, a mob of Indians of the Creek or Muskogee Nation or Tribe, said mob being composed of N. B. Moore, National Treasurer, as aforesaid, of the Creek or Muskogee Nation or Tribe; Isparhachar, aforesaid, a leading chief of the Creek or Muskogee Nation or Tribe of Indians, and other responsible authorities of the Creek or Muskogee Nation or Tribe of Indians, did, in the nighttime, threaten the lives of those persons engaged in the construction and preservation of the afore-

said pasture fence and did burn, tear down, destroy and render valueless the posts, wire and other materials of which said pasture fence was constructed, or that was upon the route of said fence ready for erection." (Rec. p. 8.)

The Court of Claims found the facts to be as follows:

"Before and after the work of building the fence commenced complaints were made by Creek Indians living in the district, and objections to the fence or pasture were made. From the time the fence was commenced and continuing throughout its construction rumors reached the parties engaged in erecting the fence of threats by Indians to destroy the same. On or about the first Monday in June, 1891, a number of Creek Indians, having banded themselves together, proceeded to destroy and did destroy so much of the fence as had been erected and to cut the wire used in the fence. When the fence was destroyed about 60 miles of it had been finished, posts had been erected around the balance, and the wire had been strung on all except about 20 miles of the distance." (Rec., p. 31.)

* * * * * * *

"On the first Monday in June the Indians divided themselves into three groups, and acting in concert attacked in the daytime the fence on three sides with axes, cutting the posts and the wire and destroying the entire fence. Spools of wire and staples had been distributed along the line of the fence preparatory to stringing the wire, and these spools of wire were cut and the

staples scattered. Two of the groups engaged in destroying the fence were each composed of about 25 Indians, who came from the settlements outside the neighborhood of the fence. These were joined by Indians inside the bounds and by Indians outside of the fence, and more than a hundred engaged in the said destruction. Isparecher, who afterwards became Principal Chief of the nation, was one of the Indian leaders in the movement to destroy the fence and in its actual destruction. He had a ranch near the boundaries of the fence and grazed several hundred cattle on the lands in question. He lived about eight miles from said neighborhood. Treasurer Moore also grazed a number of cattle on said lands and lived about six miles from the pasture. He was another of the leaders in the said destruction. Fixico, an Indian preacher, who lived in the neighborhood of the fence, was another of the leaders, and except these three, who were the leaders, the evidence does not show the names of the Indians engaged in the work of destruction." (Rec., pp. 32-33.)

* * * * * * *

"The said threats to destroy the fence became and were matter of general notoriety in the Deep Fork District. The parties engaged in building the fence did not apply to the Indian authorities for protection against said threats, and none of said authorities took steps to prevent the destruction of the fence." (Rec., p. 33.)

In its opinion, delivered through Chief Justice CAMPBELL, the Court of Claims said:

"From the very beginning complaints were made against the e r e c t i o n of said fence, and plaintiff and his representatives knew of them. Threats of its destruction were made, w h i c h grew in intensity until they finally resulted in a large body of Indians getting together and utterly destroying the fence so far as it had been then completed. * * * Plaintiff's petition avers that the damage was inflicted by a 'mob of Indians of the Creek or M u s k o g e e Nation or Tribe;' and if that be true the Creek Nation is not to be held responsible for the mob's action. It can be said of the Creek Nation, as was said of the Cherokee Nation, that it has 'many of the rights and privileges of an independent people. They have their own constitution and laws and power to administer their internal affairs. They are recognized as a distinct political community, and treaties have been made with them in that capacity'." (Rec., p. 42.)

A mob is defined by Bouvier to be "a crowd excited to some violent and unlawful act," and in that sense the body of Indians who destroyed the fence constituted a mob.

That a state, a sovereign power, or any political subdivision thereof, is not responsible for damages done by a mob is too elementary for discussion. A state may, by legislative enactment, provide for such liability upon its part, or upon the part of any of its political subdivisions, and many of the United States have done so, but, in the absence of such leg-

islative enactment, the injured party is relegated to an action against the individuals composing the mob.

Long before and after the events narrated in claimant's petition the Creek Nation was a distinct political entity, possessing sovereign rights and attributes, and was so recognized by the Government of the United States, as witnessed by the several treaties concluded between the two governments. It is true that the Government of the United States exercised a supervisory control over the affairs of the Creek Nation, but, by a treaty concluded June 14, 1866, it was agreed that the Congress of the United States should enact no legislation that would in any manner interfere with or annul the tribal organization, rights, laws, privileges, and customs of the Creek Nation. As late as 1901 and 1902 the Congress of the United States recognized the Creek Nation as a separate and independent political body, as evidenced by the Original and Supplemental Creek Agreements. These Agreements were virtually treaties authorized by the Congress and President of the United States on one side, and the Creek National Council and its Principal Chief on the other side. They were concluded with something of the solemnity attendant upon treaties between the United States and foreign nations, and were duly proclaimed by the President of the United States.

Again, the claimant's petition is predicated upon the theory that the Creek people constituted an independent nation, with sovereign rights and attributes, subject only to the plenary power of the United States. In the fourth paragraph of the petition it is recited that "the Creek Nation or Tribe of Indians was a self-governing body, having the right and power to enact laws for the government of the territory occupied by the Creek Nation or Tribe of Indians under the terms of treaties between the United States of America and the said Creek Nation or Tribe of Indians," and a judgment is prayed against "the Creek or Muskogee Nation or Tribe of Indians," and not against the several members of the tribe.

The petition is likewise predicated on the theory that the fence was destroyed by a crowd of individual Creek Indians, excited thereto by a number of causes enumerated in the findings of fact by the Court of Claims. In other words, that the fence was destroyed by a mob. In the tenth paragraph of the petition it is stated that "a number of Indians of the Creek or Muskogee Tribe or Nation, * * * did burn, tear down, destroy and render valueless the posts, wire and other materials of which said fence was constructed, or that was upon the route of said fence ready for erection." This is, in so many words, an allegation that the work was that of a mob.

But the petition seeks to fix the responsibility for the damages done by this mob on the entire Creek people, as a tribe or nation, by a further allegation that "the responsible authorities of the Creek or Muskogee Tribe or Nation of Indians *permitted* a mob of Indians to assemble to terrorize those persons engaged in the construction of the pasture fence aforesaid, and finally effectually to destroy said pasture fence and the material on the ground for the completion of said pasture fence," and the further allegation that said mob was "composed of N. B. Moore, National Treasurer, as a f o r e s a i d, of the Creek or Muskogee Nation or Tribe of Indians; Ispachachar, aforesaid, a leading chief of the Creek or Muskogee Nation or Tribe of Indians, and other responsible authorities of the Creek or Muskogee Nation or Tribe of Indians."

This last allegation is not borne out by the findings of fact. In Finding X of the facts found by the Court of Claims Isparhechar, Treasurer Moore and Fixico were found to be the leaders of the mob. Isparhechar was not at that time a chief of the Creek Nation, although he afterwards became so. Fixico was an Indian preacher. It does not, therefore, appear that either Isparhechar or Fixico was a Creek government officer in any sense of the word, but Moore was the National Treasurer of the Creek Nation.

It does not appear by the Findings of Fact by the Court of Claims that any official of the Creek Nation, other than Treasurer Moore, engaged in the work of destruction. The question then is, did Treasurer Moore's participation in the work of the mob render the Creek Nation liable for the damage done?

By Finding III of the Findings of Fact by the Court of Claims it seems that the duty of the National Treasurer, who was elected by the National Council and not by the people of the Creek Nation, was to receive and receipt for all national funds and to disburse such funds, as provided by law. He was not a law enforcement officer. He was in no sense a law executive. He was merely the custodian and disbursing agent of such tribal funds as came into the Creek Treasury. He possessed no more authority to disperse a mob, bent on violence, than did any other private citizen of the Creek Nation. Insofar as he was a part of the mob, and insofar as he engaged in the actual work of destroying the fence, he acted in his private and individual capacity. He was a co-trespasser, not acting by color of office, but in open violation of law. He was not at that time engaged in receiving or receipting for tribal funds or revenue, nor in their disbursement, but was engaged in an act of vandalism, in no wise connected with his office or the performance of his duties.

The petition alleges, in paragraph 10, that the work of destruction was accomplished by Moore, Isparhecher, *and other responsible authorities of the Creek or Muskogee Nation or Tribe of Indians,* but the responsible authorities are not named, nor are they disclosed by the findings of fact. It may be assumed, therefore, that Moore was the only member of the mob having any kind of authority in the Creek Nation, and, inasmuch as he was not acting *colore officii,* the Creek Nation was not responsible for the damage done by him.

But the petition says, in paragraph 10, that the Creek Nation permitted a mob of Indians to assemble and destroy the fence. The Findings of Fact do not support this allegation but, assuming it to be true, do the facts stated in it create a liability on the part of the Creek Nation for the damage done by the mob? The contrary of this proposition is respectfully submitted to be the law.

The well-considered case of *Hart* v. *Bridgeport,* 13 Blatchford, 239, 11th Federal Cases, 681, is much in point both upon the question of the liability of the Creek Nation because of the participation of its National Treasurer in the work of the mob, and the question of the failure of the responsible Creek authorities to prevent the work of destruction.

As to the first question, involving Moore's participation in the work of the mob, that case says:

"It is further alleged that the acts of violence were well known by the defendant to be done without right or claim of right, and in violation of law. The substance of these averments is, that the mayor and the police officers were co-trespassers, not acting *colore officii,* but in open and known hostility to the requirements of law. Assuming that the averments are sufficiently definite to sustain the action, the corporation is not liable for the unlawful acts of its officers, committed *ultra vires,* and not *colore officii,* in the known and wilful violation of law. *Thayer* v. *Boston,* 19 Pick, 511; *Buttrick* v. *Lowell,* 1 Allen, 172; *Western Homeopathic Medicine College* v. *City of Cleveland,* 12 Ohio St. 375. The demurrer is sustained."

As to the second question, the failure of the Creek authorities to prevent the destruction of the fence, the same case says:

"And it may be considered as settled, that 'a city which has assumed, or on which is imposed, a public governmental duty, is not liable for the nonperformance or negligent performance of such duty, and it makes no difference that the duty is imposed by a special charter which the city has accepted.' *Hewison* v. *New Haven,* 37 Conn. 475."

Finding X of the Findings of Fact by the Court of Claims shows that, although threats to destroy the fence were generally known, and known, too, to the persons engaged in the building, no application

was made by them, or by Blackstone and Turner, to the officers of the Creek tribal government to prevent its destruction. The claimant Turner knew of these threats and so informed Waggoner & Son, assignees of the rights of Pussy, Tiger & Company under their contract. At the instance of Turner, Waggoner & Son procured from the United States Court an order restraining L. C. Perryman and Jacob Knight, Principal Chief and District Judge respectively of the Nation, from tearing down and removing the fence, but this order was ineffectual and futile, inasmuch as neither the Principal Chief, Perryman, nor the District Judge, Knight, had threatened to do any of the things mentioned in the restraining order, nor is it claimed in the petition that either of these two persons formed a part of the mob, or took part in the destruction of the fence. The action should have been directed against those by whom the threats were made, and the claimant should have requested the protection of those in authority in the Creek Nation. The record discloses no legislative act of the Creek National Council by the terms of which a suit is authorized against the Creek Nation by an individual who had suffered damage at the hands of a mob, nor has the Congress of the United States made provision for the institution of such a suit. The remedy, if any, was against the individuals composing the mob, and not the independent, self-governing Creek Nation.

That the Creek Nation was an independent, self-governing body has been held by the Circuit Court of Appeals for the Eighth Circuit, in the case of *Crabtree* v. *Madden*, 54 Fed. 426. In that case the Circuit Court of Appeals, speaking through SANBORN, Judge, said:

> "By the treaty of June 14, 1866 (14 St., p. 788, Art. 10) it was stipulated that 'the Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of persons and property within the Indian Territory: *provided*, however, (that) said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs.' The Act of May 2, 1890, enlarging the jurisdiction of the court below, recognizes the existence and e x c l u s i v e jurisdiction in some cases of the tribal courts and the validity of contracts made according to the laws of the tribe. These treaties and this legislation demonstrate that this tribe has carefully preserved its separate political identity, and that it is still managing its own affairs, and exercising, through officers of its own selection, legislative, executive and judicial functions within its territorial jurisdiction."

In further support of the views in this paragraph expressed, the authorities following are cited:

*County of Allegheny* v. *Gibson's Son & Co.*, 90 Pa. 397;

*Dale County* v. *Gunter*, 46 Ala. 118;

*Mayor of Baltimore* v. *Poultney*, 25 Md. 107;

*Bell's Administratrix* v. *City Council of Montgomery*, 53 Ala. 527;

*Gianfortone* v. *City of New Orleans*, 61 Fed. 64;

*City of New Orleans* v. *Abbagnato*, 62 Fed. 240;

*State of Louisiana ex rel. Folsom* v. *Mayor, as Administrator of New Orleans*, 109 U. S. 285;

*German Bank* v. *United States*, 13 U. S. 703.

## II.

**The Contract Between Pussy, Tiger & Company and Jacob Knight, District Judge, Was Void in Law.**

By Act of Congress approved June 30, 1834 (R. S., Sec. 2116), it was provided that no lease of lands from any nation or tribe of Indians should be valid unless the same was made by treaty or convention pursuant to the constitution. The act in question reads as follows:

> "*Purchases or Grants of Lands From Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. Every person who, not being employed under the au-

thority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty."

There was no pretense of a compliance with this statute. The contract was made between Pussy, Tiger & Company and Jacob Knight, a district judge of the Creek Nation, pursuant to an Act of the Creek National Council approved October 26, 1889. The preamble to this Act (Rec., p. 26) clearly shows its intent, and the motives actuating the Creek National Council in its passage. It had been the custom for a limited number of citizens to inclose large areas of the public domain for grazing purposes, and this worked to the detriment of persons living in the neighborhood of such inclosures. On the other hand, there had been an influx of cattle into Creek territory from surrounding nations, likewise detrimental to the Creek people, and it was thought desirable by the Creek Council that legislation be enacted which

would remedy this evil. Accordingly the National Council passed, and the Principal Chief approved, the Act in question.

By the terms of the Act it was provided, among other things, that any citizen, the head of a family, might have the privilege of inclosing one square mile of the public domain, for grazing purposes, for his exclusive use, but it was also provided by the Act, partially for the protection of the people of the nation against the influx of cattle from adjoining territory, that pastures greater in extent than one square mile might be located on the borders of the nation, subject, however, to a decision of the people of the neighborhood, to be evidenced by the result of an election called for that purpose by the district judge. If the election resulted favorably, it became the duty of the judge to enter into a contract with such citizen or citizens as would bind themselves to build around the pasture thus created a substantial fence of four or more strands of wire, and to pay for the grazing privilege an amount equal to five cents per acre per year of the land inclosed, the contract to be in force for a period of three years, with privilege of renewal.

It will be observed that the Act limited the privilege to *citizens*. The contract in this instance was made between the district judge and Pussy, Tiger & Company, all of whom were not citizens. Pussy, Ti-

ger & Company was an association consisting of one hundred Indians and Pleasant N. Blackstone and Clarence W. Turner. Neither Blackstone nor Turner was a citizen of the Creek Nation, and yet, both were members of the association.

Turner was intermarried with the daughter of an adopted citizen, and might possibly have been entitled to the privilege had it not been for the above-quoted Act of Congress, which inhibited the leasing of Indian lands by non-citizens. This Act operated on Turner as a citizen of the United States, and took precedence over the Creek Tribal Act extending to intermarried citizens certain rights and privileges belonging to citizens of the tribe.

Turner and Blackstone were the moving spirits in the association. They procured its organization, and originated the plan whereby it should make application for the election and a contract for the pasture, in the event of a favorable result. They financed the venture, and arranged for large profits out of it for themselves. They were virtually, and to all practical intents and purposes, the organization itself. To each of the Indian contingent they were to give $100.00 per year for a period of three years, the life of the contract, and they were to pay to the Creek Nation taxes at the rate of five cents per acre per year, but to them was reserved any annual rental that might be received for the use of the pasture.

Being themselves prohibited by law from making the contract with the district judge, they devised the indicated subterfuge. By indirect methods they proposed to secure profits which the statutes prohibited them from securing directly. This, the law does not sanction. When the performance of a given thing is forbidden by law it may not lawfully be done indirectly. In view of the non-citizenship of Blackstone and Turner, and their membership and large financial interest in the association of Pussy, Tiger & Company, the contract between that association and District Judge Jacob Knight was null and void. The case of *Cherokee Strip Livestock Association* v. *Cass Land and Cattle Company*, 138 Mo. 394, sustains the foregoing contention. In that case the facts were that in the year 1888 the Cherokee Nation entered into a written lease with the Cherokee Strip Livestock Association, for a period of five years, for the lease of a large tract of their lands in the Indian Territory. The lease was not approved by the Secretary of the Interior, nor the Commissioner of Indian Affairs, nor was it executed in conformity with said Section 2116. On January 1st, 1889, the Cherokee Strip Livestock Association sublet a part of the tract to the Cass Land and Cattle Company, subject to the terms and conditions of their lease from the Cherokee Nation. The Cass Land and Cattle Company gave certain promissory notes to the Cher-

okee Strip Livestock Association in payment of the consideration for the sub-letting. The Cherokee Strip Livestock Association brought suit against the Cass Land and Cattle Company on one of these notes, and it was contended by the Cass Land and Cattle Company, by way of defense, that the note in suit was a part of the lease contract entered into by the Cherokee Strip Livestock Association and the Cherokee Nation for the lease of the same lands leased to it by the Cherokee Strip Livestock Association, and that, inasmuch as the first mentioned lease was not executed in accordance with said Section 2116, both that lease and the note in suit were void. On these facts the Supreme Court of the State of Missouri, citing in support thereof the opinions of Attorney General Garland (18 Ops. Attys. Gen., 235-486), held as follows:

> "But on June 30, 1834, by Act of Congress, it was provided 'no purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian Nation or Tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.' (R. S. of United States, Sec. 2116.) There is no pretense in this case that the contract of lease between plaintiff and the Cherokee Nation was executed in accordance with said Act. On the contrary, it was executed in violation thereof; hence, absolutely void."

Again, in the same case, the Supreme Court of the State of Missouri said:

> "We are confirmed in this position by the proclamations of BENJAMIN HARRISON, President of the United States, of February 17, 1890, and September 19, 1890, by which the lease from the Cherokee Nation to plaintiff was ignored, and all livestock ordered moved from the leased lands at the dates respectively fixed in said proclamations. These proclamations were issued in pursuance of the prerogative of our government to exercise a kind of guardianship over the friendly Indians within its borders, and to protect them as far as possible to do so, in their property rights, against scheming and designing white men; and, to this end, it has uniformly, as in this case, exercised the right of excluding intruders from their lands. The cases in this country are uniform in holding that a contract forbidden by statute is void, and the general rule is that no action or suit can be maintained either at law or equity upon such a contract, even where the statute does not expressly declare them void *Downing* v. *Ringer*, 7 Mo. 585; *Penn* v. *Bornman*, 102 Ill. 523; *Melchoir* v. *McCarty*, 31 Wis 252; *Ohio Life Insurance & Trust Co.* v. *Merchants' Insurance & Trust Co.*, 11 Humph. 1."

On July 21, 1885, the Attorney-General of the United States handed down an opinion, in answer to the following questions submitted to him by the Commissioner of Indian Affairs:

"Whether there is any law empowering the Interior Department to authorize Indians to enter into a contract with any parties for the lease of Indian lands for grazing purposes; and also whether the President or the Interior Department has any authority to make a lease for grazing purposes of any part of an Indian reservation, or whether the approval by the President or Secretary of the Interior would render any such lease made by Indians with other parties lawful and valid."

In response to these questions the Attorney-General discussed Section 2116 and, among other things, said:

"This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be a fee simple, or a right of occupancy merely, is not material; in either case the statute applies. It is not, therefore, deemed necessary or important, in connection with the subject under consideration, to inquire into the particular right or title to the above-mentioned reservations held by the Indian tribes or nations respectively which claim them. Whatever the right or title may be, each of these tribes or nations is precluded, by the force and effect of the statute, from either alienating or leasing any part of its reservation, or imparting any interest or claim in or to the same, without the consent of the government of the United States. A

> lease of the land for grazing purposes is as clearly within the statute as a lease for any other or for general purposes, and the duration of the term is immaterial. One who enters with cattle or other livestock upon an Indian reservation under a lease of that description, made in violation of the statute, is an intruder, and may be removed therefrom as such, notwithstanding his entry is with the consent of the tribe. Such consent may exempt him from the penalty imposed by Section 2117 (R. S.) for taking his stock there, but it can not validate the lease, or confer upon him any legal rights whatsoever to remain upon the land; and to this extent and no further was the decision of Judge BREWER, in *United States* v. *Hunter*, 21 Fed. Rep. 615."

In the case of *Mayes* v. *Livestock Association*, 58 Kansas 712, the effect of said Section 2116 on a lease of Indian lands for a period of five years was discussed, and, upon the facts in that case, the following conclusion was reached:

> "There was no treaty or consent of the United States to the lease, but it was made in violation of the foregoing provision. Instead of consenting, the officers of the United States denied the right to enter into a lease, and in considering the effect of the statutory provision upon the lease in question, the Attorney-General held that 'whatever the right or title may be, each of these tribes or nations is precluded by the force and effect of the statute from either alienating or leasing any part of the reservation,

or imparting any interest or claim in or to the same, without the consent of the government of the United States. A lease of the land for grazing purposes is as clearly within the statute as a lease for any other or general purposes, and the duration of the term is immaterial. One who enters with cattle or other livestock upon an Indian reservation under a lease of that description made in violation of the statute, is an intruder and may be removed therefrom as such, notwithstanding his entry is with the consent of the tribe.' (18 Ops. Attys. Gen. 235-486.) Acting upon the advice of the Attorney-General that the lease was illegal, and declaring that the further occupancy of the land thereunder was prejudicial to the public interests, the President, on February 17, 1890, ordered the removal of all livestock from the leased lands. It is clear that the contract of lease between the plaintiff and defendant conflicted with the governmental policy and was in direct violation of a positive statute. It was, therefore, illegal, and the courts generally hold that no action can be maintained on a contract forbidden by law."

In the instant case by no stretch of the imagination can it be contended that the contract between Pussy, Tiger & Company and the district judge, Jacob Knight, was made by any treaty or convention pursuant to the constitution and, this being true, that contract was void, and being void and the foundation of appellant Turner's claim, it necessarily follows, under the authorities quoted, that there can be

no recovery. Further authorities in support of this contention are as follows:

*Garst* v. *Love,* 6 Okla. 46;
*United States* v. *Mille Lac,* 229 U. S. 494;
*Light* v. *Conover,* 63 Pac. 966;
*Bass* v. *Smith,* 71 Pac. 628.

III.

**The contract between Pussy, Tiger & Company and the District Judge Jacob Knight, was not only void in law, but it was void in fact.**

The association of Pussy, Tiger & Company was made up of one hundred Creek Indians and Pleasant N. Blackstone and Clarence W. Turner. The Indians were poor and illiterate. Blackstone and Turner were men of means and, presumably, of business acumen. Following the enactment of the measure providing for the creation of border pastures, Blackstone and Turner evidently determined to secure to themselves the privilege thereby authorized. They knew that, inasmuch as they were not citizens of the Creek Nation, they could not lawfully make application for an election for a pasture in their own names, and they, therefore, conceived the scheme of binding together a number of Creek citizens, by whom the application should be made, intending themselves to reap the profits of it, in the event it succeeded.

For this purpose they engaged one hundred Indians, ninety-eight of whom lived within the confines of the proposed pasture. These Indians, because of their propinquity to the proposed pasture, would have the right to vote at an election called to determine whether or not the pasture should be established.

At a second election a majority of these Indians did vote, and voted for the pasture. (Rec., p. 30.) It is a most significant fact that Blackstone and Turner selected for their purpose ninety-eight Indians who were entitled to vote at the election. This fact would not have been so significant were it not for the further fact that, prior to the election, Blackstone and Turner had entered into an agreement with these Indians whereby they were to pay to each Indian who was a party to the agreement the sum of $100.00 per year for three years. This fact seems to be susceptible of but one construction. It could have been intended for no other purpose than to influence the Indians, authorized to vote, as they were, at the ensuing election. The Indians were to perform no service in return for the $100.00, nor to give to the association any other thing of value. They were not even required, by the terms of their agreement with Blackstone and Turner, to pay any part of the taxes on the lands to be inclosed, amounting to five cents per acre per year. Why, then, did Blackstone and Turner select these particular ninety-eight Indians

to become a part of their organization? Why did they select so large a number of Indians, when two or three would have answered their purpose as well? Even one Indian citizen would have been sufficient, because, following a favorable election, it became the duty of the judge to let the privilege "to such citizen or citizens as may by contract bind themselves * * *, " etc. These facts can, and do, point to but one conclusion, and that is, that the Indians were chosen in such numbers as to insure a favorable result, and were promised such emoluments as would necessarily influence their votes, at the election subsequently to be held.

Nor were the Indians wholly blameless, unless they are to be excused by reason of their illiteracy and ignorance. They knew at the time the application was made to the District Judge for the election that they were without means to build such a fence as the Act of the National Council required. To that extent, at least, so far as they were concerned, they were practicing deception upon the district judge. Had Blackstone and Turner not been a part of the organization it is wholly improbable that the fence would ever have been built, or the taxes paid. And the judge, himself, in the very nature of things, having, as he did, jurisdiction over the very people who were to vote at the election, and the lands from which the pasture was to be segregated, could not

have been without some knowledge of conditions, more especially the fact that the Indians were poor and financially unable to comply with the terms of any contract to construct around one hundred thousand acres of land a fence such as the Act of the National Council contemplated.

Another significant fact is that, prior to the winter of 1890, Blackstone and Turner had made an agreement with Daniel Waggoner & Son whereby the pasture was to be sublet to the latter, for the purpose of grazing their cattle thereon, and in consideration thereof Daniel Waggoner & Son were to pay to Blackstone and Turner the sum of $27,500.00 per year during the life of the Pussy, Tiger & Company contract. It will thus be seen that Blackstone and Turner planned their scheme with every attention to detail.

A still further significant fact is the wording of the application presented to the judge for the pasture election. This application gave the boundaries of the proposed pasture, and then recited the acreage "to be not less than one hundred thousand acres." To the uninformed Indian voters it must have presented the appearance of a request to enclose about one hundred thousand acres. In that respect it was certainly misleading. The boundaries named in the application are not described as are the boundaries named in the contract. Their contract authorized

them to inclose a pasture sixteen miles in width and twenty-five miles in length. Simple calculation shows that boundaries of these dimensions w o u l d inclose two hundred fifty-six thousand acres, or more than two and a half times the acreage proposed in the application. When, therefore, Blackstone and Turner began the construction of the fence surrounding a rectangular tract of land sixteen miles wide and twenty-five miles long, totaling a length of fence eighty-two miles in extent, they undertook a thing which they were not authorized to do, that is, to build more fence than was warranted by the application and the election thereon. It may well be argued that, had they limited the inclosure to one hundred thousand acres there would have been no interference with the fence. In any event, there would not have been so much fence to destroy and, therefore, not so much loss to Blackstone and Turner, as proved to be the fact.

Blackstone and Turner were intelligent men. At least, the facts disclosed by the record would indicate that they could perform simple problems in arithmetic. Any village school boy could have computed the acreage embraced within the limits proposed to be inclosed by Blackstone & Turner. Certainly, therefore, they must have known that they were proposing to inclose two hundred and fifty-six thousand acres of land, and yet, we find them tender-

ing taxes due to the Creek Nation in the sum of $1,-250.00 as a quarterly payment, when they should have tendered for that purpose the sum of $3,200.00, had they been acting in good faith in the premises. The sum of $1,250.00 would have been a proper tender had the inclosure embraced an acreage of only one hundred thousand acres.

In this state of facts, no rights can arise to the claimant Turner, as the surviving partner of the firm of Blackstone & Turner, and the authorities already cited are sufficient to support this view of the law.

IV.

**Blackstone & Turner sustained no loss of profits, nor any loss that was actionable, under the facts.**

The claimant prays j u d g m e n t against the Creek Nation for $10,078.16, materials destroyed, after deducting salvage, $2,500.00 paid to the Indians composing Pussy, Tiger & Company, $1,250.00 paid to Jacob Knight as taxes, and $82,500.00 for the loss of pasture. He likewise asks interest on these v a r i o u s sums, the total aggregating $194,-729.03. From this sum he subtracts certain amounts by way of set-off, leaving a balance of $105,698.03, for which he sues.

An analysis of the figures easily demonstrates that claimant sustained no such loss. The contract was for a term of three years. Blackstone & Turner

were to pay the taxes, amounting to five cents per acre per year. At the time the fence was destroyed they were engaged in inclosing 256,000 acres. The annual taxes, therefore, would have amounted to $12,800.00, and the total taxes required to be paid by them under their contract for the three years would have been $38,400.00. By the terms of their agreement with the Indians they were to pay each Indian $100.00 per year. There were 100 Indians to be paid. Their annual payment, therefore, on that account would have been $10,000.00, and for the three years, $30,000.00. At the time the fence was destroyed they had expended on work and material the sum of $12,046.62, and at that time about 60 miles of the fence had been completed, posts set around the remainder, and wire strung the entire distance except 20 miles. Measured by the cost of that part of the fence already constructed, the work and material necessary for the construction of the remainder would necessarily have been in excess of the sum of $2,200.00. When, therefore, to the $30,000.00 to be paid to the Indians, and the $38,400.00 to be paid in taxes, is added the $12,046.62, the cost of the fence already completed, and the $2,200.00, the cost of the work and material necessary to the completion of the remainder, it will be seen that the total expenditures required of Blackstone and Turner would have been $82,646.62.

But under their contract with Daniel Waggoner & Son they were to receive an annual rental of $27,500.00, or the total of $82,500.00 for the three years during which the contract was to continue. As a mathematical deduction from these figures, it follows that Blackstone & Turner would have lost $146.62 had they completed the pasture fence, and had Daniel Waggoner & Son kept their contract.

The Findings of Fact point conclusively to the source from which Blackstone & Turner expected to derive their profits. It was their purpose to pay taxes, evidently, on only 100,000 acres of land. This is shown by the fact that they tendered only $1,250.00 as the first quarterly payment. Payment of taxes on that basis would have amounted to $5,000.00 per year, or a total of $15,000.00 for the full period of the contract, whereas, payment on the basis of 256,000 acres would have amounted to $12,800.00 per year, or a total of $38,400.00. The difference between these two totals is $23,400.00, and Blackstone & Turner would have profited to that extent in the event their plans had succeeded. It is hardly probable, however, that the claimant will insist on a judgment in that sum, estimated in that way and on that basis.

The only real loss sustained by Blackstone & Turner was the cost of the construction of that part of the fence completed, less the salvage in materials

secured by them. This, they fix at $10,078.16, and this must be the limit of their demand.

On the theory of the case already presented, however, Blackstone & Turner were intruders on the land which they were seeking to inclose, and the contract under which they were building the fence was void. In building the fence, therefore, they committed a public nuisance, which any private individual, thereby specially injured, possessed the right to abate. The abating party, of course, performs the act at his own risk, and is liable for any damage done in excess of that required for the purpose. It is plain enough that the Indians considered themselves injured, and took advantage of this principle of law. It does not appear that, in doing so, they did more damage than was necessary to accomplish their object, but even if they were guilty of excesses in the work of destruction, they themselves were individually and personally liable for their acts, and not the entire Creek Nation, of which they were merely members.

The item of $1,250.00, tendered in auditor's certificates to the National Treasurer, as a quarterly payment of taxes, is not recoverable, for the very simple reason that the National Treasurer refused to accept the certificates and they were returned to Blackstone & Turner through Moty Tiger, by whom they had been transmitted.

Nor is the $2,500.00, paid in April by Blackstone & Turner to the Indians composing the Pussy, Tiger & Company, recoverable, for the reason that it was paid pursuant to a private agreement between Blackstone & Turner and the Indians, and did not grow out of the contract entered into between Pussy, Tiger & Company and District Judge Knight. If Blackstone & Turner received nothing of value in return for this payment the Creek Nation was in nowise responsible because it was not a party to the agreement pursuant to which the payment was made. Blackstone & Turner might have had, and probably did have, a right of action for money had and received to their use by the Indians, because of a failure of consideration, but that is no reason why they should now assert a claim for the $2,500.00 against the Creek Nation.

The claimant demands judgment for interest on four of the items of damage set out in his petition, and in each instance the claim for interest is in excess of the original demand. Even if the claimant were entitled to recover judgment on each of these items he would not be entitled to recover interest thereon, on authority of *Tillson* v. *United States,* 100 U. S. 43, as follows:

> "Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the Gov-

ernment the rule is different, for in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares 'That no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless a contract expressly stipulating for interest.' (R. S., Sec. 1091.) This is conclusive. No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimants."

The conclusion is, therefore, that Blackstone & Turner sustained no actionable damage, and that whatever damage they sustained in fact was *damnum absque injuria.*

V.

**The Court of Claims was without jurisdiction to hear and determine the matters in controversy.**

The Act of Congress, pursuant to which this suit was instituted in the Court of Claims, extends authorization to that court "to consider and adjudicate and render judgment, as law and equity may require, in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, *vs.* the Creek Nation," for certain described injuries. It will be observed

that the language of the Act limits the jurisdiction of the court to the rendition of a judgment against the Creek Nation. It nowhere confers jurisdiction on the court to render judgment against the United States.

A very similar Act of Congress was construed by this court in the case of *Green* v. *Menominee Tribe of Indians* in Wisconsin, and the United States, 233 U. S. 558. In that case, as in the one under consideration, there was an absence of authority to include the United States in the suit. The suit, as originally instituted, was against the tribe and certain individual members of it. The defendants demurred on certain grounds, the demurrer was sustained and the suit dismissed, whereupon the plaintiff filed an amended petition, joining the United States as a defendant. To this amended petition the defendants interposed a second demurrer, denying, among other things, the right to implead the United States as a defendant. This demurrer was likewise sustained, and the petition dismissed. In reviewing the action of the lower court in dismissing the petition this court, in the case mentioned, said:

> "The court held that the jurisdictional act, except so far as concerned the statute of limitations, created no new right in favor of the petitioner, but simply afforded a means of establishing, by a proceeding in the Court of Claims, the existence, if any, of a claim against the tribe

and the individual members of the tribe as such. From this premise the conclusion was deduced that the act gave no right to sue the United States and conferred no jurisdiction upon the court below over claims against an Indian as a mere individual aside from his membership of the tribe or disassociated from his dependent condition as an Indian subject because of such condition, to the exercise by the United States of governmental supervision and control. The court consequently decided that it was not concerned with any supposed liability of the individual defendants as citizens of the United States, resulting from their purely individual and personal contracts and which, therefore, were not related to or connected with tribal membership or the dependency resulting from status as an Indian as distinguished from citizenship. We think the conclusions thus reached by the court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness."

So, in the instant case, the Act of Congress did not authorize a suit against the United States, although it was joined as a co-defendant with the Creek Nation. At one stage of the case they were dismissed out of the court on an amendment of the original petition, but on the following day the order allowing the filing of the amended petition was set aside, and they were reinstated as a party defendant by a further amended petition. On the authority of the case

of *Green* v. *the Menominee Tribe of Indians, et al.*, the petition in this case should have been dismissed by the Court of Claims, under the demurrers (Rec., pp. 21-22) filed by the National Attorney for the Creek Nation and the Assistant Attorney General for the United States, and should now be dismissed by this court.

No principle of law is better settled than that the United States can not be sued without their consent, as evidenced by an Act of Congress. Citations of authorities in support of this proposition are so numerous as to make mention of them here unnecessary.

By Act of Congress approved March 3, 1897, the jurisdiction of the Court of Claims is defined to be as follows:

> "SEC. 1. *Court of Claims, General Jurisdiction of.*—That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "*First.* All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if

> the United States were suable; *Provided*, however, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department or commission authorized to hear and determine the same."

It will be observed that Congress excepted actions sounding in tort, in the operation of this statute. It follows that, if the present action sounds of tort, the Court of Claims had no jurisdiction to entertain it.

The question then arises as to what is the nature of the action. Does it sound of tort, or is it an action *ex contractu?* If it is an action *ex contractu* the Creek Nation is in no wise liable, because the record nowhere shows that the Creek Nation violated the contract entered into between Pussy, Tiger & Company and District Judge Knight. The Creek Nation could act only through its executive, legislative and judicial departments. There was no executive order, there was no act of the National Council, there was no judicial decision, upon the part of the Creek Nation abrogating the contract, or authorizing its violation. It is true that the petition recites that "the responsible authorities of the Creek Nation

*permitted* a mob of Indians to assemble and destroy the fence," but this is not equivalent to an allegation that the Creek Nation violated the contract, nor is the recital that certain named Creek Indians "and other responsible authorities destroyed the fence," equivalent to such an allegation. Had there been an allegation that the Creek National Council passed, and the Principal Chief approved, an act abrogating the contract, or an act designed for the destruction of the fence and that in pursuance thereof it was destroyed, then there might be something in the view that the Creek Nation violated the contract and that, consequently, this is an act *ex contractu*, but, unfortunately for that contention, the record nowhere discloses, and the petition nowhere recites, the enactment of any such authoritative measure upon the part of the legislative and executive branches of the Creek government.

On the other hand, the petition does recite, in paragraph 10, that the fence was destroyed by a mob of Indians. A contract can not be violated except by a party to it, and the petition does not allege, nor do the Findings of Fact show, that the Indians who destroyed the fence were parties to the contract. Their purpose was not to violate a contract, but to destroy what they conceived to be a public nuisance, by which they suffered a special injury. It was either a wanton depredation, or the

rightful abatement of a nuisance, but it was not a violation of a contract. If this view is accepted it was a tort, and the Court of Claims is without jurisdiction to adjudicate cases sounding in tort.

The plaintiff is bound by the allegations of his petition. The rule is that the allegations of a pleading will be construed most strongly against the pleader. The petition alleges that the "responsible authorities of the Creek Nation *permitted* a mob of Indians to assemble and destroy the fence," and by "authorities" is evidently meant the officers of the Creek Nation, but, even if true, it has been shown that this constituted merely *misfeasance* on the part of such "authorities," for which the Creek Nation was in no way responsible. The allegation that "certain named Creek Indians and other responsible authorities," again meaning thereby Creek officials, *did,* in fact, destroy the fence was only another way of charging such authorities with *malfeasance* in office, for which it has likewise been shown that the Creek Nation is not responsible.

The action of the Indians involved in these allegations amounted to trespass to property, and trespass to property is a tort, for which an action will lie, but is not cognizable by the Court of Claims.

In speaking of this restriction on the jurisdiction of the Court of Claims this court, in the case of *Langford* v. *United States,* 101 U. S. 341, said:

"The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the office or agent of the government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu,* which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives. The question is not a new one in this court."

It is respectfully submitted that the petition of claimant should be dismissed.

JAMES C. DAVIS,
*Creek National Attorney.*

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 33

CLARENCE W. TURNER, *Appellant*

*vs.*

*The* UNITED STATES *and*
*The* CREEK NATION *of* INDIANS

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF IN REPLY FOR THE CREEK NATION

### *Argument.*

Counsel for appellant set out in their brief, at pages 22 and 23, their two main contentions, and state that they deem these the determining points in the case, although they will notice other points not deemed material by the claimant. Point two has been sufficiently discussed in the brief already filed for the United States, and that filed in behalf of the Creek Nation, but neither brief adverts to point number one. Entertaining always the highest respect for the views and opinions of counsel for the appellant, it was nevertheless thought that the reverse of the

proposition embraced in point one was so admittedly the law that any reference to it as a question involved in this case was omitted. Since, however, counsel for appellant lays such marked stress on this point, an analysis of it, and citation of authority respecting it, would seem not only proper but required. It reads as follows:

Claimant contends:

> "1. That by the jurisdictional act Congress, which had reports before it from the executive departments showing destruction of the fence and the contract for the fence, plainly manifested a purpose that the Creek Nation should respond in such damages as law and equity required, provided the injury done were brought home to responsible authorities of the Creek Nation directly, or their cognizance of, or acquiescence in, the violence were established under conditions that made it in law and equity a wrong to be remedied by the Nation."

Reduced to simple language, this means that the jurisdictional act created a cause of action in favor of Turner as against the Creek Nation.

It is respectfully submitted that there is, in the act, no basis for this contention, and that the purpose of the act was merely to provide a forum in which the claim of Turner might be considered and adjudicated. The act does not affirm that Turner's property was destroyed, or the value of the loss of his pasture incurred, by the Creek Nation, or by the action of any of its responsible authorities, or with their cognizance or acquiescence. Nothing is predicated con-

cerning these matters, but there is something predicated concerning the matter of Turner's claim for these losses, and that is, that the Court of Claims is authorized to consider and adjudicate and render judgment therein, as law and equity may require. The entire section, authorizing institution of suit, is composed of but one sentence, and a single sentence can have but one subject and one predicate. It follows that there was no finding by Congress that Turner's property was in fact destroyed, or loss of the value of his pasture in fact sustained, by the action of any of the responsible Creek authorities, or with their cognizance or acquiescence, because the section contains no affirmation of such facts. All of the clauses of the section following the word "claim" are qualifying clauses, clauses descriptive of the claim, pointing out to the Court of Claims what claim was authorized to be considered and adjudicated by that Court. The claim itself was to be determined by that Court as law and equity might require. The section simply clothed the Court of Claims with power to investigate and determine the facts under the rules of law and equity applicable thereto. Clearly it was not the intention of Congress to assert and declare a liability to Turner on the part of the Creek Nation, and leave to the Court of Claims the naked right to assess his damages. This is the conclusion reached by the Court of Claims (Rec., pp. 37-38).

The case of the United States vs. Mille Lac Band of Chippewa Indians, 229 U. S., 498, would seem to be controlling in this case, because of the similarity of the jurisdictional act in that case. In the Mille Lac case this Court,

speaking through Mr. Justice Van Devanter, stated the jurisdictional act as follows:

> "This suit was begun under the act of February 15th, 1909, 35 Stat., 619, c. 126, which authorized the Court of Claims 'to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States.'"

In construing this act the Court said:

> "The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. United States vs. Old Settlers, 148 U. S., 427, 469; United States vs. Choctaw, &c., Nations, 179 U. S., 494, 735; Sac and Fox Indians, 220 U. S., 481, 489."

Equally conclusive, and for the same reason, is the case of Green vs. Menominee Tribe, 233 U. S., 558. In this case the Court, speaking through Mr. Chief Justice White, stated the jurisdictional act as follows:

"By an act of Congress of May 29th, 1908 (35 Stats., 444, c. 216, 2), jurisdiction was conferred upon the Court of Claims, 'to hear, determine, and render final judgment, notwithstanding lapse of time or statute of limitation, for any balances found due, without interest, with the right of appeal as in other cases,' upon the claims of eight named persons who were described in the act as 'traders,' against Menominee tribe of Indians in Wisconsin and against certain members of said tribe at the Green Bay Agency, for supplies, goods, wares, merchandise, tools and live stock furnished certain members of the said tribe after the first day of January, in the year eighteen hundred and eighty, for the purpose of carrying on logging operations upon the Menominee Indian Reservation, in Wisconsin."

In construing the act this Court held, in so far as the jurisdictional feature was concerned, as follows:

"The Court held that the jurisdictional act except so far as concerned the statute of limitations created no new right in favor of the petitioner, but simply afforded a means of establishing by a proceeding in the Court of Claims the existence, if any, of a claim against the tribe and the individual members of the tribe as such."

* * * * *

"We think the conclusions thus reached by the Court are so clearly the necessary result of the text of the act that we content ourselves with referring to that text as a demonstration of their soundness."

It is, therefore, respectfully submitted that, in view of the authorities quoted, this contention of appellant is without merit.

JAMES C. DAVIS,
*Creek National Attorney.*

# TURNER *v.* UNITED STATES AND CREEK NATION OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 33. Argued November 13, 14, 1918.—Decided January 7, 1919.

While recognized by the United States as a distinct political community, the Creek Nation leased a pasture, the lessees undertaking to fence and pay rent. When nearly completed, the fence was destroyed by the action of a Creek mob, participated in by the Creek Treasurer; and thereafter one of the lessees, assignee of the rest, sued the Creek Nation for the cost of the fence and of the assignments and for the loss of the benefits of the lease. *Held*, that there was no cause of action; for a sovereignty, on general principles, is not liable for injuries resulting from mob violence or failure to keep the peace; and neither the wrong of the Treasurer nor any duty under the lease created such liability here. P. 357.

The special Act of May 29, 1908, c. 216, 35 Stat. 444, 457, authorized suit in the Court of Claims against the Creek Nation for the adjudication of this claim, but it did not validate the claim itself or permit that the United States be joined as a defendant. P. 358.

51 Ct. Clms. 125, affirmed.

THE case is stated in the opinion.

*Mr. Chas. H. Merillat*, with whom *Mr. Chas. J. Kappler* was on the brief, for appellant.

*Mr. Assistant Attorney General Thompson* and *Mr. George M. Anderson*, for the United States, submitted.

*Mr. James C. Davis*, for the Creek Nation of Indians, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of

Congress, they then exercised within a defined territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge.[1]

In 1889 the Creek Nation enacted a statute which conferred upon each citizen of the Nation, head of a family engaged in grazing livestock, the right to enclose for that purpose one square mile of the public domain without paying compensation. Enclosure of a greater area was prohibited; but provision was made for establishing, under certain conditions, more extensive pastures near the frontiers to protect against influx of stock from adjoining nations. The conditions prescribed were these: If the district judge should receive notice from citizens of a desire to establish such a pasture, he was required to call a meeting of citizens to consider and act upon the subject; and if it appeared that a majority of the persons of voting age in the neighborhood thus to be protected favored its establishment, the district judge was directed to let such pasture for three years (subject to renewal) to citizens who would by contract bind themselves to build a substantial fence around the pasture, and to pay at least five cents per acre per annum for the grazing privilege.

In 1890 Turner and a partner formed, under the name of Pussy, Tiger & Co., an organization consisting of themselves and one hundred Creeks, with a view to securing such a pasture in the Deep Fork district. They caused an election to be held and a contract to be entered into by the district judge with Pussy, Tiger & Co., which covered about 256,000 acres. The fence required to enclose it was

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[1] Treaty of June 14, 1866, Art. X, 14 Stat. 785, 788; Report of the Commissioner of Indian Affairs for 1888, p. 113; for 1889, p. 202; for 1890, pp. 89, 90; for 1891, vol. I, pp. 240–241.

about 80 miles in length. Before its construction was begun, dissatisfaction had already developed in the neighborhood; and from the time the fence was commenced, there were rumors of threats by Indians to destroy it if built. The work was, however, undertaken; the threats continued; and Turner and one of his assignees secured from the United States Court in the Indian Territory, First Judicial Division, an injunction restraining the Creek district judge for the Deep Fork district and L. C. Perryman, the Principal Chief of the Nation, from interfering with or damaging the fence. After it had been nearly completed, three bands of Creek Indians destroyed the fence, cutting the wire and posts and scattering the staples. It does not appear that either the Creek judge or the Chief or any other official of the Creek Government had any part in the destruction of the fence, except one Moore, the Treasurer, whose only official duties seem to have been "to receive and receipt for all national funds and to disburse the same, as should be provided for by law."

More than $10,000 net expended in constructing the fence, and $2500 paid by Turner to the 100 Creek Indians associated with him for the release of their grazing rights were lost; and large profits which it was expected would be made through assignment of pasturage rights to cattle raisers were prevented. Claims for compensation were repeatedly presented by Turner to the Creek Nation. Once its National Council voted to make compensation; but Chief Perryman vetoed the action and his veto was sustained. Later the Creek supreme court declared the fence a legal structure; but still the Nation failed to make any compensation. On March 4, 1906, the tribal organization was dissolved pursuant to Act of March 1, 1901, c. 676, § 46, 31 Stat. 861, 872. In 1908 Congress provided, by § 26 of the Act of May 29, 1908, c. 216, 35 Stat. 444, 457, as follows:

"That the Court of Claims is hereby authorized to

consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

In August, 1908, Turner, having acquired all the rights of his associates, filed a petition in the Court of Claims against the Creek Nation and the United States as trustee of Creek funds,[1] to recover the amount lost, which he alleged to be the sum of $105,698.03. The Court of Claims dismissed the petition (51 Ct. Clms. 125), and the case comes here by appeal.

The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property and prevented him from securing the benefits of the contract entered into between him as grantee and the Creek Nation; and that if the substantive right did not already exist, it was created by the act which conferred jurisdiction upon the Court of Claims to hear and adjudicate the controversy.

*First.* No such liability existed by the general law. The Creek Nation was recognized by the United States as a distinct political community, with which it made treaties and which within its own territory administered its internal affairs. Like other governments, municipal as well as state, the Creek Nation was free from liability

[1] On November 18, 1915, the sum of $1,325,167.16 was held by the United States in trust for the Creek Nation of Indians. In addition thereto approximately $1,110,000.00 of the tribal funds of the Nation were on deposit in the Oklahoma state and national banks, on April 10, 1916, under the provisions of the Act of March 3, 1911, c. 210, § 17, 36 Stat. 1058, 1070.

for injuries to persons or property due to mob violence or failure to keep the peace. Compare *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 287, 291; *South* v. *Maryland*, 18 How. 396; *Murdock Grate Co.* v. *Commonwealth*, 152 Massachusetts, 28, 31. Such liability is frequently imposed by statute upon cities and counties (see *City of Chicago* v. *Pennsylvania Co.*, 119 Fed. Rep. 497); but neither Congress nor the Creek Nation had dealt with the subject by any legislation prior to 1908. The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace. And the participation in the injuries of an officer acting, not *colore officii*, but in open and known violation of the law, cannot alter the case. The claimant's contention that the defendant owed to the claimant, as its own grantee, a greater duty than it owed to other persons in the territory, to protect him against mob violence, finds no support in reason or authority.

*Second.* The special Act of May 29, 1908, did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent. The Court of Claims is "authorized to consider and adjudicate and render judgment as law and equity may require." The words of the act which follow merely identify the claims which the court is authorized to consider. Authority to sue the Creek Nation is implied; but there is nothing in the act which even tends to indicate a purpose to create a new substantive right. Compare *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Green* v. *Menominee Tribe*, 233 U. S. 558, 568; *Thompson* v. *United States*, 246 U. S. 547. The act simply provides a forum for the adjudication of such rights as Turner may have against the Creek Nation.

*Third.* The United States objected also to the jurisdiction of the court over it. Neither the special act nor any general statute authorized suit against the United States. As it cannot be sued without its consent, the United States was improperly joined as a party defendant, although in the capacity of trustee for the Creek Nation. Compare *Green* v. *Menominee Tribe, supra.*

It is not necessary to consider the many other objections urged against the petition. The Court of Claims properly dismissed it; and the judgment is

*Affirmed.*